TRANSCRIPT OF RECORD

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(25,081)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 343.

FRANK L. KIRK, ELISHA S. KIRK, AND ELMA E. KIRK, PLAINTIFFS IN ERROR,

vs.

HANS OLSON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

INDEX.

	Original.	Print
Clerk's return to writ of error.....(omitted in printing)..	*a*	
Notice and service of appeal.....(" ")..	*b*	
Appellants' brief and abstract on appeal from the circuit court of Custer county.....(omitted in printing)..	*d*	
Complaint	1	1
Answer	2	1
Reply	10	4
Proceedings, &c.	10	5
Testimony of Hans Olson	10	5
Otto Newberg	13	6
Elisha S. Kirk	13	6

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 4, 1916.

	Original.	Print
Plaintiff's Exhibit D—Letter of Garfield, Secretary, June 7, 1907	18	9
E—Extracts from letters from Commissioner to Rapid City land office	24	11
Defendants' Exhibit 2—Amended location of placer claim	26	12
3—Receiver's receipts on application No. 1369, &c.	28	13
4—Receiver's receipt on mineral entry No. 1267	29	13
5—Letter, Acting Commissioner to register and receiver, July 18, 1903	30	14
6—Letter, Acting Commissioner to register and receiver, December 10, 1903	33	15
7—Letter, Secretary to Commissioner, June 30, 1904	37	17
8—Letter, Commissioner to register and receiver, July 15, 1904	40	18
9—Letter, Commissioner to register and receiver, September 8, 1904	41	19
10—Letter, Commissioner to register and receiver, October 18, 1906	45	21
12—Notice by register, February 13, 1911	48	22
Findings	55	25
Findings of fact	56	25
Conclusions of law	57	26
Decree	58	27
Notice of intention to move for new trial (omitted in printing)	60	
Motion for new trial (omitted in printing)	61	
Order denying motion for new trial (omitted in printing)	62	
Appeal	63	28
Undertaking on appeal	63	28
Assignment of error	64	28
Statement of the case	71	32
Brief and argument (omitted in printing)	78	
Respondent's brief and supplementary record	109	35
Affidavit of E. L. Grantham	109	35
Demurrer	110	35
Letter from Assistant Commissioner, February 24, 1910	113	36
Brief and argument (omitted in printing)	121	
Opinion, Gates, J.	164	40
Judgment	170	43

	Original.	Print
tition for rehearing.....(omitted in printing)..	173	
erk's memorandum: Rehearing denied.....	179	45
tition for writ of error.....(omitted in printing)..	180	
signment of errors.....	196	45
nd on writ of error.....(omitted in printing)..	201	
der allowing writ of error.....(" ")..	206	
rit of error.....	208	48
ation and service.....(omitted in printing)..	211	
ecipe for record.....(" ")..	214	
erk's certificate.....(" ")..	217	
atement of errors to be relied upon and designation by plaintiffs in error of parts of record to be printed, &c.....	218	49
signation by defendant in error of parts of record to be printed.....	227	54

1 * * * * * * *

Complaint.

The plaintiff in his complaint states his cause of action as follows:

I.

That the plaintiff is the owner and entitled to the possession of certain lands in Custer County, South Dakota, including the North Half (N. ½) of the North West Quarter (N. W. ¼) of Section 8, in Township 4, South, of Range 4 East, containing 149.98 acres.

II.

That the defendants claim an interest in the land and are now and since the 3rd day of February, 1912, wrongfully in possession of the premises or a portion thereof, to the damage of the plaintiff in the sum of Two Hundred Dollars.

2 III.

That the claim of the defendants is wrongful and without right.

IV.

That the value of the use of the premises is One Hundred Dollars. Praying judgment and decree for the possession of the premises and quieting title thereto in the plaintiff and damages in the sum of Three Hundred Dollars. (Record pp. 140-141.)

Answer.

To which defendants answer and make general denial of every allegation, matter and thing in the complaint contained; and for further and affirmative defense and cross-complaint defendants allege:

1. That prior to the month of November, 1901, and prior to any settlement, occupation or entry of any of the lands described in the complaint, the defendants were the owners of the Kirk Placer Claim; that the same was a valid and subsisting mining claim theretofore taken and appropriated under and by virtue of the laws of the United States respecting the location of placer mining claims. That location certificate was duly filed for record in the office of the Register of Deeds of Custer County, South Dakota, and at and prior to any settlement, occupation, or entry by the grantor of
3 the plaintiff, the defendants entered into possession and have at all times been in the exclusive, sole, and undisputed possession thereof.

That on the 18th day of November, 1901, defendants filed Mineral Application No. 1369 for said placer claim containing 157.929

acres, designated as Mineral Survey 1381, described by metes and bounds, the official plat and notice of the survey having been filed in the office of the Register and Receiver of the United States Land Office at Rapid City; and the defendants made Mineral Entry No. 1267 for said claim, paying the acreage thereon to the United States, and obtained the Receiver's Receipt therefor, entitling the defendants to patent for the whole of said Kirk Placer Mining Claim, under which the defendants became and still are the owners of that portion of the N. W. ¼ of the N. W. ¼ of Section 8, Township 4, South, Range 4, East of the Black Hills Meridan, containing 19.439 acres, described as follows:

From corner No. 1, Kirk Placer, section corner common to sections 5, 6, 7, and 8, T. 4, S., R. 4, E., B. H. M., bears north 75 degrees and 10′, west 360 feet distant. Beginning at corner No. 1 Kirk Placer thence S. 65 degrees 27′ E., 750 ft. to corner No. 2 Kirk Placer. Thence S. 19 degrees 24′ W. 920.23 ft. to cor-
4 ner No. 3 Kirk Placer. Thence S. 38 degrees 07′ E. to intersection of quarter section line in W. ½ of said Sec. 8. Thence N. 89 degrees 40′ East on said quarter section line 757.5 ft. to S. E. corner N. W. ¼ N. W. ¼ said Sec. 8. Thence N. 4′ W. on Section line between Sections 7 and 8 to intersection with line of Kirk Placer Mineral Survey No. 1381 between corner No. 15 and corner No. 16 Kirk Placer. Thence North 1 degree 13′ East to said corner No. 16. Thence North 22 degrees 39′ East 617.5 ft. to corner No. 1 and place of beginning containing 19.439 acres.

2. That about the month of July, 1903, there was issued by the Department of the Interior an order directing the owners of the Kirk Placer Claim to show cause why the Kirk Placer should not be cancelled, specifying as grounds for such cancellation, that charges had been preferred by officers of the Forestry Department alleging that the Kirk Placer Claim was not mineral in character, but agricultural, and that the work done on said placer was not placer work but done for another and different purpose, and because the said placer claim failed to conform to the legal sub-divisions.

That thereafter such proceedings were had and showing made that the Department of the Interior declared and adjudged said
5 placer claim to be valid and finally determined that the owners of the Kirk Placer Claim were entitled to patent therefor under proceedings had.

3. That on July 12th, 1902, John Bostrom made Homestead Entry No. 6970 for the lands described in his complaint, including the N. W. ¼ of the N. W. ¼ of Section 8, in conflict with the Kirk Placer.

4. That on October 22, 1902, William A. Nevin and Frank L. Kirk filed Mineral Protest against the Homestead Entry, alleging conflict between the Monatomic lode claim and the Kirk Placer Claim. A hearing was ordered to determine the character of the ground embraced in the conflict between the Monatomic lode claim and the Homestead Entry, and a further order was made directing the homestead entryman to show cause why his entry should not be cancelled to the extent of its conflict with the Kirk Placer.

5. That testimony was taken and proceedings had upon the conflict between the Monatomic lode claim and the Bostrom homestead entry, which was determined in favor of the owners of the owners of the Monatomic lode claim; that the testimony taken in said proceedings was presented to the Department as the homestead entryman's showing of cause and regularity of the proceed-
6 ings and the validity of the entry to the Kirk Placer Claim; and notwithstanding the fact that Elisha S. Kirk was not made a party to said proceedings, the Department entered the order sustaining the entry as to the conflict and ordering a cancellation of that part of the Kirk Placer Claim in conflict with the Bostrom homestead.

6. That the validity of the Kirk Placer Claim was by the Department of the Interior, upon proceedings duly and regularly had, determined on the 6th day of September, 1904, and the same was adjudged to be valid and subsisting and the entry thereof to all homestead thereunder regular, and that the same was mineral in character, and that the amount and character of the work done was sufficient to comply with the law.

That the entry of the Kirk Placer Claim and the rights of the defendants thereunder by reason of priority were superior to the rights and claims of the homestead entryman. That the defendants were in possession thereof and held title thereto subject to the paramount title of the United States long prior to any entry or settlement by the grantor of the plaintiff.

7. That in making his application and original homestead entry the homestead entryman, falsely, and without any color or pre-
7 tense to possession or dominion over the tracks embraced in the conflict, falsely represented to the Department that he was in possession thereof. That in truth and in fact the homestead entryman was not at any time in possession of any portion of the tract in conflict between the Kirk Placer Claim and the said homestead entry, as said representation and statements were a fraud upon the Department of the Interior and officers thereof in charge of the disposing of public lands and but for which false and fraudulent representation, affidavit and proof, patent to said tract would have been issued to John Bostrom.

8. That under the public land laws relating to such tract it was necessary at the time of final proof that the entryman show and satisfy the Department that he was in possession of the said homestead and the whole thereof. That the receipt of the homestead application, placing the same of record, and the perfecting of the final proof, and acceptance of final payment and final entry by the Department, were, in the absence of such proof, misrepresented, unauthorized, unlawful and in violation of the rights of the defendants so far as it applied to the area in conflict. That said entry was, as to the conflict, void and ineffectual, and the plaintiff's grantor acquired no right or interest in said premises by virtue thereof or of the patent therefor issued.

8 9. That all acts required by law to perfect the location of the Kirk Placer had been performed, and the defendants

were in possession, and the Kirk Placer was a valid and subsisting mining claim, and the area within the boundary lines had been segregated from the public domain and was the property of the defendants in this action and not subject to homestead entry or other disposal under the public land laws of the United States; and at the time of the making of the homestead entry and at the time of making final proof and final entry under the homestead laws, the said lands in conflict were segregated from the public domain and not subject to entry or disposal by the Department of the Interior and no entry thereof under the homestead law could be regularly or lawfully made; notwithstanding which fact, the entry was received.

That the Kirk Placer was at all times and still is a valid and subsisting mining claim and no part thereof regularly or lawfully cancelled for any purpose, and no portion of the Kirk Placer was at any time prior to or at the time of the issuance of the patent a part of the public domain or within the disposing power of the officers of the Department of the Interior except as to the defendants under the location and entry of the Kirk Placer Claim.

9 10. That the plaintiff had full knowledge at all times of the conflict and well knew that the homestead entryman was not at any time in possession but that the defendants were at all times in possession of the lands in conflict under the location and entry of the Kirk Placer Mining Claim, and well knew that the grantor of the plaintiff falsely and fraudulently represented to the Department of the Interior and to the officers thereof, that the same was unappropriated public lands of the United States and subject to homestead entry by the entryman, but for which false and fraudulent representations *and* homestead entry *by the entryman, but for which false and fraudulent representations and homestead entry* would not have been accepted, or final entry and proof nor patent therefor issued.

11. That but for the entry of the Bostrom homestead in conflict *of* the Kirk Placer Claim, the Department of the Interior would have issued to the defendants patent to the Kirk Placer Claim, including the area in conflict and in controversy in this action; and prays that the plaintiff and his grantor, John Bostrom, patentee, be adjudged and decreed to hold title to the area in conflict between the Kirk Placer Mining Claim and the Bostrom homestead in trust for these defendants, and that these defendants be decreed to be

10 the owners thereof, and that their title thereto be quited and for general relief. (Record and Transcript pp. 120-131.)

Reply.

To which answer and cross-complaint the plaintiff replied by general denial of all the averments therein, and demands the judgment in the complaint demanded.

Proceedings.

This cause came on for trial before the court by stipulation of parties at Hot Springs, South Dakota, on the 25th day of April, 1913, and on the trial the following proceedings were had:

The plaintiff, being called as a witness in his own behalf, and examined by Mr. Wilson, testified as follows:

I am the plaintiff in the action; claim right and possession of the property described in the complaint. Exhibit A is the Patent to John Bostrom for Lots 8 and 11, Section 5, and N. ½ N. E. ¼ Section 8, in Town 4, South, Range 4, East of the Black Hills Meridian, Custer County, South Dakota.

(Plaintiff's Exhibit A thereupon admitted in evidence without objection, the same being a patent issued under the homestead law of the United States, dated May 25th, 1911.)

Plaintiff's Exhibit B is a deed from John Bostrom and wife
11 to me for the same premises. (Record and Transcript p. 2.)

Exhibit B offered in evidence and received without objection the same being a warranty deed in due form, duly acknowledged, and dated on the 3rd day of February, 1912, duly recorded in the office of the Register of Deeds of Custer County, South Dakota.)

I am acquainted with the defendants; they have forbidden me to go up on the land described in the complaint in the N. W. ¼ of the N. W. ¼ Section 8.

(Plaintiff's Exhibit C is an abstract of title to the lands in controversy. Plaintiff's Exhibit C offered in evidence and admitted without objection and shows location certificate of the Kirk Placer Claim by courses and distances, dated June 8th, 1894. Receiver's final receipt to John Bostrom for the lands described in the Homestead Entry, dated October 20th, 1902. Patent from the United States to John Bostrom dated May 25th, 1911. Mortgage John Bostrom and wife to Custer County Bank, dated November 14th, 1910. Satisfaction of said mortgage February 5th, 1912. Warranty Deed from John Bostrom and wife to Hans Olson dated February 3, 1912.)

The land in controversy is enclosed by fences. I demanded possession of the lands from Kirk in March last year
12 (Record and Transcript p. 3) and the demand was refused: they refused to recognize the government deed I had to it. The defendants have kept me absolutely out of possession. The rental value of the property is $100.00 per year. There is about twenty acres or a little less of land under controversy; it is farming and meadow land except about a half acre, practically all farming land. (Record and Transcript p. 4.) I have been kept out of possession just one season. There was a fence on the line (Record and Transcript p. 5); I intended to continue that fence through, but they stopped me; I told them I had a deed to it.

Cross-examination by Ed. L. Grantham:

The land in controversy is fenced in by Kirks with their other lands (Record and Transcript p. 6); the fence is now as it has been, practically on the same line for the last twenty years. The lands in controversy have been fenced within the Kirks' enclosure for the whole period of twenty years. I have known all the time that they had it fenced and that they occupied the particular lands in question and knew that they had farmed it every year. (Record and Transcript p. 7.) I bought the land from Bostrom; I was a witness for Bostrom when he and Kirks had a contest on about it; I knew this land was embraced in the conflict; I knew all the time Kirks
13 were claiming it (Record and Transcript p. 9); no part of the purchase price was withheld on account of the contest. I paid for it in full in cash. I did not have a placer claim covering the same lands with Shields (Record and Transcript p. 10); I did some work there but I did not hold any claim. I assisted Mr. Shields in doing the work on this land about twenty years ago and have been familiar with the line of the claim since I helped to build the fence there; did not claim any interest in the land; Mr. Shields got the land. (Record and Transcript p. 11.) The Gold Star Mining Company owned the land at the time we built the fence; I was working for the Gold Star Mining Company; if the land was located in my name I don't remember it. (Record and Transcript p. 12.)

Otto Newberg, being called as a witness on behalf of the plaintiff testified as follows.

Direct examination by Mr. Wilson:

My name is Otto Newberg; have lived in the vicinity of the land for twenty years. The usual contract of land is half the crop. (Record and Transcript p 13.)

Plaintiff rests.

Elisha S. Kirk, called as a witness on behalf of the defendants, testified as follows:

My name is Elisha S. Kirk; I am familiar with the lands
14 in controversy and have been for twenty-five years. (Exhibit 1 offered and received in evidence, same being the location certificate of the Kirk Placer Mining Cla-m.) (Record and Transcript p. 14.) At the time of the making of the location certificate myself and Frank L. Kirk were in possession of the land; it was fenced at the time we got this land twenty-six years ago in January or twenty-six years ago in February. We moved onto it in February twenty-six years ago; at that time it was enclosed by fence; nobody since that date has been in possession of the Kirk Placer Claim or any part of it except myself and Frank L. Kirk. (Record and Transcript p. 15.)

(Exhibit 2, a certified copy of the amended location certificate of the Kirk Placer Claim was offered and received in evidence.)

Receiver's Receipt for Mineral Entry 1269, Lot No. 1381, was received from myself from the United States Land Office.

(Exhibit 3, being Receiver's Receipt for the filing fee and Mineral Application No. 1369, Mineral Certificate No. 1381, offered and received in evidence.)

Exhibit 4, Receiver's Receipt Mineral Entry No. 1269, Lot No. 1381, dated February 15th, 1902, was received by me and my co-owner from the United States Land Office at Rapid City, Exhibit 4 being the final receipt of the Receiver of the United States Land Office for Mineral Entry 1267, known as the Kirk Placer. (Offered and received in evidence.)

(Exhibit 5, Department letter, July 18th, 1903, offered and received in evidence. Exhibit 6, certified letter of the Commissioner of the General Land Office dated December 10, 1903, offered and received in evidence. (Record and Transcript p. 16.) Exhibit 7, certified copy of Commissioner's letter to defendant July 15th, 1904, offered and received in evidence. Exhibit 8, letter of the Honorable Commissioner of the General Land Office under date of July 15th, 1904, accompanying Exhibit No. 7 offered and received in evidence.

Exhibit 9, certified copy of letter of Honorable Commissioner dated September 8th, 1904, offered and received in evidence. Exhibit 10, being certified copy of Commissioner's letter October 18th 1905, offered and received in evidence. Exhibit 11, letter of the Honorable Secretary of the Interior dated June 7th, 1907, offered and received in evidence. (Record and Transcript p. 17.)

This land is in the Black Hills Forest Reserve. I was not at any time a party to the proceedings before the Department of the Interior and General Land Office in the case of William A. Nevin and Frank L. Kirk vs. John Bostrom; I received no notice of any proceedings in that case; have not authorized anybody to appear for me or in my interest in that proceeding. (Record and Transcript p. 18.)

(Exhibit 12, notice of protest by the Government, offered and received in evidence. (Record and Transcript p. 19.) The contest or protest referred to in Exhibit 12 and the answer thereto, being marked Exhibit 13, is still pending and undisposed of. (Record and Transcript p. 20.) I have got a hearing coming yet on that matter. Exhibits 14 to 29 are tax receipts issued by the County Treasurer of Custer County for taxes paid by me upon the Kirk Placer Mining Claim. (Offered and received in evidence.) (Record and Transcript p. 21.)

Cross-examination by Mr. Wilson:

I received an order about the month of July advising that that portion of the Kirk Placer in conflict with the Bostrom Homestead had been cancelled. I first employed Mr. Grantham seven or eight years ago (Record and Transcript p. 22); Mr. Grantham and Mr.

Feay were getting this patent through for us. They have been looking after this matter for us; I think it was six or seven years ago we first had Mr. Grantham looking after it. I know Mr. Olson;
17 I know of his making a demand on me for possession of the premises about a year ago; I told him that it was my land, that I had a hearing coming yet, that it was not settled yet between us and the Government and that as long as the Government let me have it and had not taken it away from me I was going to hold it and that he had no right on there or anybody else. I had a notice that it was cancelled but later I had a notice that the hearing was coming, a hearing on this proposition. (Record and Transcript p. 23.) The notice described this particular land. I told Mr. Olson that I had had no hearing and had signed no papers; the hearing that I referred to is between the United States and me and my brother. (Record and Transcript p. 24.) I changed the fence to run on the line in 1910 as it stands now.

Defendants rest. (Record and Transcript p. 25.)

Plaintiff offers in evidence Exhibit D, being a letter from the Secretary of the Interior to the Commissioner of the General Land Office under date of January 7th, 1907; also Exhibit E, being four letters from the Commissioner of the General Land Office to the Register and Receiver of the Land Office at Rapid City, dated May 15th, 1909 February 24th, 1910, March 24th, 1910, and
18 February 11th, 1911; which offers were admitted in evidence.

Plaintiff offered in evidence Exhibit F, being a photograph of Mineral Survey 1381; also offers Exhibits G, H, and I, being tax receipts from the County Treasurer of Custer County, for the homestead lands described in the Patent for the years 1910, 1911 and 1912; which offers were received in evidence.

Both sides rest. (Record and Transcript p. 26.)

Exhibit A is a patent from the United States of America to John Bostrom for Lots 8 and 11 of Section 5, and the N. ½ N. W. ¼, Section 8, Township 4, South, of Range 4, East of the Black Hills Meridian, South Dakota, in due form, dated May 25th, 1911. (Record and Transcript p. 27.)

Exhibit B, is a warranty deed from John Bostrom and wife to Hans Olson, conveying all of said lands, dated February 3rd, 1912; acknowledged in due form. (Record and Transcript p. 28.)

Exhibit C is the abstract of title, hereinbefore described. (Record and Transcript p. 29-33.)

Plaintiff's Exhibit D is as follows:

Department of the Interior.

E. H. M. A. B. P.
G. N. E.
S. V. P.

9 Washington, June 7, 1907.

36-354 04540.

G. W. W.

WILLIAM A. NEVIN and FRANK L. KIRK
v.
JOHN BOSTROM.

The Commissioner of the General Land Office.

SIR: October 20, 1902, John Bostrom made final homestead entry No. 2794, upon regular proofs, for lot 8, the S. E. ¼ of the S. W. ¼ of Sec. 5 and the N. ½ of the N. W. ¼ of Sec. 8, in T. 4 S., R. 3 E., B. H. M., Rapid City, South Dakota, land district. The lands are situate within the Black Hills Forest Reservation, and the entry was made under the provisions of the acts of March 3, 1889 (30 Stat., 1074, 1075), and April 15, 1902, (32 Stat., 106), by which homestead entry may be made under certain circumstances within the reservation.

October 22, 1902, William A. Nevin and Frank L. Kirk filed their joint protest against the homestead entry, in which it is alleged that they are the owners of the Monatomic lode mining claim, and the Kirk placer mining claim, both of which conflict in part with the homestead entry, and that the lands within the conflicts are mineral in character and were known to be so prior to the allowance of such entry.

The record shows that February 15, 1902, Frank L. Kirk and (Record and Transcript p. 33) Elisha S. Kirk made entry for the Kirk placer mining claim, survey No. 1381, and that the claim as entered covers a portion of the N. W. ¼ of the N. W. ¼ of said section 8.

September 8, 1904, your office directed the local officers to notify the homestead claimant that he would be allowed sixty days from notice within which to show cause why his entry should not be cancelled to the extent of the conflict with the prior placer entry; and also to notify the protestants that they would be allowed sixty days from notice within which to apply for a hearing upon the charges in their protest. A hearing was accordingly applied for and ordered.

After other proceedings, not necessary to be considered here, your office, January 13, 1905, advised the local officers that—

Inasmuch as in the case at bar a hearing between the parties is to be had which involves the character of the land, there would appear to be no objection to the homestead claimant at the same

time submitting his evidence showing why his homestead entry should not in part be cancelled, and have all the issues de-
21 termined at the one hearing.

The hearing was had May 8, 1905, at which both parties appeared and submitted evidence.

December 12, 1905, the local officers found the lands in conflict to be agricultural in character, and recommended that the protest be dismissed, and that the homestead entry be held intact.

Upon appeal by the protestants, your office, by decision of October 18, 1906, affirmed the find-the placer and the homestead entries, and held the placer entry for cancellation to the extent of such conflict. As to the conflict between the Monatomic lode location and the homestead (Record and Transcript p. 34) entry, it was stated, in effect, that whilst the northern half of the location is shown to be mineral in character, it does not appear that the southern half thereof, the portion in conflict, as of any value for mining purposes, and the stated finding of the local officers in this respect was also affirmed, and it was held that the homestead entry might be allowed to proceed to patent including the conflict with the Monatomic location.

The protestants have appealed to the department.

It is contended by the appellants that entry having been
22 allowed for the Kirk placer claim prior to the allowance of the homestead entry the question of the character of the land in the former is not now a proper subject of inquiry. This contention cannot be sustained. It is too well settled to need discussion that the land department has the jurisdiction and power and that it is its duty, to inquire into and determine questions brought to its attention, touching the validity of claims asserted under the public land laws, at any time prior to the issuance of patent. (Michigan Land and Lumber Co. v. Rust, 168 U. S., 589, 592-3; Purcher v. Gillem 26 L. D., 34, 39-41; F. A. Hyde & Co., 33 L. D., 639, and cases cited.)

The record shows that the Monatomic claim was located August 12, 1891, and that about one-half of the location, which is 1500 feet long and 300 feet wide, conflicts with the homestead entry. It is also shown that the placer claim extends nearly across and covers about two-thirds of the N. W. ¼ N. W. ¼ of said Section 8, one of the subdivisions embraced in the homestead entry.

The further facts in the case are stated with substantial (Record and Transcript p. 35) accuracy in your office decision and need not be restated here. It is sufficient to observe that no mineral of value has been discovered on the above described tract, and the evidence shows that such land has been used for many years
23 for agricultural purposes by the mineral claimants, and that it is chiefly valuable for such purposes. The evidence carefully considered sustains the concurring conclusions below respecting the land in controversy between the placer and homestead claimants.

The homestead entry was wrongfully allowed as to the conflict with the prior placer entry, but inasmuch as it has been shown that

the land in the forty-acre subdivision in which the conflict exists is not mineral in character, the placer entry will be canceled to the extent of the conflict, and the homestead entry may be permitted to stand with respect thereto, so far as the government is concerned, provided no intervening rights have attached.

This leaves for consideration the conflict between the Monatomic lode claim and the homestead entry. (Record and Transcript p. 36.)

* * * To the extents of the conflict with the Monatomic location the homestead entry will be accordingly cancelled.

The decision of your office is accordingly modified. The papers are herewith returned.

Very respectfully,
JAMES RUDOLPH GARFIELD,
Secretary.

(Record and Transcript p. 37.)

24 Exhibit E, letters of the Commissioner of the General Land Office, to the officers of the Rapid City Land Office, are as follows:

May 15, 1909, he wrote:

"In the above entitled case this office is in receipt of your letter dated March 31, 1909, forwarding proof of service of notice upon the parties in interest of decision of the Secretary dated June 7, and Acting Secretary on Review Sep. 20, 1907, directing cancellation of the homestead entry to the extent of conflict with the Monatomic lode location and the mineral entry to the extent of the portion in the N. W. ¼ of N. W. ¼ of Sec. 8, T. 4 S., R. 4 E., B. H. M., the forty being included in the homestead entry ,and reporting no further action.

Service was made by registered mail received in February, 1908.

Said decisions have accordingly become final, the cancellations have been made as directed, and the case is hereby closed. (Record and Transcript p. 39.)

You will notify the homestead claimant that he will be allowed sixty days within which to apply for a segregation survey to exclude the ground embraced in the Monatomic location, and that in default the entry will be rejected as to each smallest legal subdivision found to be in conflict.

25 You will also notify the Kirk placer claimants that they will be allowed sixty days within which to apply to the surveyor general for an amended survey to eliminate the portion situate in the N. W. ¼ of N. W. ¼ of Sec. 8, and that in default, M. E. 1267 will be cancelled in its entirety." (Record and Transcript p. 40.)

March 24th, 1910, as follows:

"Mineral entry 1267 made February 15, 1902, for the Kirk Placer, is hereby cancelled to the extent of the conflict with the N. E. ¼ of N. E. ¼ of Sec. 7, T. 4 S., R. 4 E., B. H. M., in accordance with the terms of letter of February 24, 1910, directing an amendment of the survey. The survey has been amended and re-

ported by the surveyor general's letter of March 14, 1910." (Record and Transcript pp. 41-43.)

February 11th, 1911, as follows:

"According to the amended plat of Sec. 5, T. 4 (T. 4 S.) S., R. 4 E., B. H. M., approved by the Surveyor General April 7, 1910, the Monatomic lode has been segregated from the S. E. ½ of S. W. ¼, leaving a fraction which is described as Lot 11, containing 34.98 acres. The certificate of entry 04540 (F. C. 2794) of Bostrum has accordingly been amended to read Lots 8 and 11 of Sec. 5, and the N. ½ N. W. ¼ Sec. 8, T. 4 S., R. 4 E., B.
26 H. M., containing 149.98 acres. Two copies hereof enclosed." (Record and Transcript p. 45.)

Plaintiff's Exhibit F is a photograph of the official plat showing the area in conflict to be 19.37 acres in the N. W. ¼ of N. W. ¼ of Section 8, T. 4, South, of Range 4, East, B. H. M., in Custer County, South Dakota. (Record and Transcript p. 47.)

Plaintiff's Exhibit G are tax receipts for the property described in the patent to John Bostrom, for the years, 1910, 1911, and 1912. (Record and Transcript p. 49-51.)

Defendants' Exhibit 1 is a location certificate of the Kirk placer claim describing the same by metes and bounds and courses and distances, dated the 9th day of June, 1894, filed for record in the office of the Register of Deeds, Custer County, South Dakota, on the 16th day of June, 1894, and recorded in Book 8, Placer Records on page 491. (Record and Transcript p. 52.)

Defendants' Exhibit 2, is an amended location of said placer claim as follows:

"Know All Men By These Presents, That Whereas, the undersigned have purchased that certain mining claim which is known as the Kirk Placer and being desirous of taking in adjoining vacant public land and more fully describing said mining claim, have this 2nd day of October, 1899, amended, located said claim, and
27 by these presents do amend, locate and claim by right of said amended location and appropriation in compliance with the Mining Acts of Congress approved May 10, 1872, and all subsequent acts and with the General Laws of South Dakota and local custom, laws and regulations One Hundred and Sixty acres of Placer Ground, Known as and called the Kirk Placer Mining Claim, situate in no organized Mining District, near Four Mile, in Custer County, South Dakota, in Sections 7, 8 and 18, Township 4, South of Range 4 East, Black Hills Meridian and being described as follows, to-wit:

Beginning at the N. corner of the claim, whence corner to Sections 5, 6, 7, and 8, Twp. 4 S., R. 4 E., B. H. M., bears N. 75 degrees 10′ W. 360 feet. * * * Thence 14th Course, N. 23 degrees 17′ E. 618 feet to Cor. No. 1, the place of beginning, containing 160 acres or less of placer ground.

We claim all water, timber and surface ground within the boundary lines of said Kirk Placer Claim, for the use and working of said claim and for domestic uses on the said claim.

This Amended Location is made without waiver of any previous-

ly acquired rights, under the original location of Kirk Placer Claim made June 14, 1894, as recorded in Book 8, page 491, Placer
28 Location records of said Custer County in the office of the Register of Deeds.

This Amended Location made on the 2nd day of October, 1899.

FRANK L. KIRK,
ELISHA S. KIRK,
A. T. FEAY,
T. V. GARLOCK,
S. N. FITCH,
R. S. LEWIS,
I. M. DONALDSON,
J. N. GRANGER,
Locators and Claimants.

STATE OF SOUTH DAKOTA,
County of Custer, ss:

This instrument of writing was filed for record on the 10th day of Oct., A. D. 1899, at 11 o'clock a. m., and duly recorded in book nine of placer on page 500.

R. W. WINDSOR,
Register of Deeds.

(Record and Transcript p. 53.)

Defendants' Exhibit 3, as follows:

4—653.

Receivers' Receipt. Mineral Application.

(Original to be immediately forwarded to General Land Office. Duplicate to be given applicant.)
29 Mineral Application No. 1369.
Mineral Survey No. 1381.

UNITED STATES LAND OFFICE,
RAPID CITY, SO. DAK., NOV. 18, 1901.

Received from Frank L. Kirk for himself and his co-claimant, Elisha S. Kirk the sum of Ten Dollars, being the fee of five dollars payable to the Register and five dollars payable to the Receiver, under paragraph 9 of Section 2238 United States Revised Statutes, for filing and acting upon Mineral Application No. 1369, for a patent to the Kirk Placer situate in Section —, in Township No. 4 S., of Range No. 4 E., B. H. Meridian, designated as Mineral Survey No. 1381.

W. S. WARNER, *Receiver.*

(Record and Transcript p. 54.)

Defendants' Exhibit No. 4, as follows:

(4-145)

Receiver's Receipt.

(Duplicate to be given the Purchaser.)
Mineral Entry No. 1267.
Lot No. 1381.

UNITED STATES LAND OFFICE,
AT RAPID CITY, SO. DAK., Feb. 15, 1902.

Received from Frank L. Kirk and Elisha S. Kirk the
30 sum of Three Hundred and Ninety-five Dollars, the same being payment in full for the area embraced in that Mining Claim known as the Kirk Placer in Township No. 4 S., of Range 4 E., B. H. Meridian, designated as Lot No. 1381, said Lot 1381, said Placer claim as entered embracing 157.929 acres in the no organized Mining District, in the County of Custer and State of South Dakota, as shown by the survey thereof.

$395.00. W. S. WARNER, *Receiver.*

(Record and Transcript p. 55.)

Defendants' Exhibit 5 as as follows:

N. H. G. P.
W. F. S.

DEPARTMENT OF THE INTERIOR.
GENERAL LAND OFFICE.
WASHINGTON, D. C., July 18, 1903.

Ex. "5" J. F.

Register and Receiver, Rapid City, South Dakota.

SIRS: February 15, 1902, Frank L. Kirk and Elisha S. Kirk made Mineral Entry No. 1267 for the Kirk placer claim, embracing portions of sections 7, 8 and 18, T. 4 S., R. 4 E.

Said claim was taken under survey No. 1381, which shows that the claim is nearly one and one-half miles long and has an
31 average width of about 800 feet. It is also shown by said plat of survey that nearly the whole of the W. ½ of N. W. ¼ of Sec. 8, a small portion of the N. W. ¼ S. W. ¼ of said section, about one-half of the S. E. ¼ of N. E. ¼ of Sec. 7, nearly all of the N. ½ of S. E. ¼ a small portion of the S. W. ¼ of S. E. ¼ and about one-half of the S. E. ¼ of S. W. ¼ said section and a small portion of the N. E. ¼ N. W. ¼ of said section 18 are covered by said claim. It therefore appears that nearly all of said claim could have been taken by legal subdivisions of ten acres or more. It is required in cases where placer claims are situate on surveyed lands that the same be made to conform to legal subdivisions of ten acres or more, where possible.

It further appears, from the report of Seth Bullock, supervisor,

that from the examination made by J. S. Smith, forest ranger, the land embraced in said claim is agricultural and not mineral land; that no gold or other mineral has been taken therefrom of any value; that only a few colors have been obtained, also slight indications of fire clay; that there are practically no mining improvements on said claim, there being only two shallow shafts, 6 and 8 feet deep. The ditch referred to in the deputy surveyor's report is stated to be a straigtening of an old creek bed, rather
32 than a ditch constructed for the development of the mineral in said claim, if any. You will therefore notify claimants that they will be allowed sixty days from receipt of notice within which to — absence of appeal, such action will be taken without further notice from this office.

By letter of November 8, 1902, transmitted with his report above referred to, Mr. Bullock states that the claimants in this case, as well as in other similar cases, were settlers prior to the establishment of the Black Hills Forest Reserve, in which the claims are situate, that they have taken the valley lands under the placer act, and are using them for agricultural purposes, having made their homes upon them and in the majority of instances, erected substantial improvements; that the lands are not valuable for the timber thereon, nor for the mineral contained therein, but were desired for farming or truck gardening. He recommends that the claimants receive due consideration, as their settlement is considered valuable for the forest reservation, and many of them have been on the lands upward of twenty years. It is, accordingly, suggested that in case of cancellation of this entry, the claimants may, if qualified, embrace most of the lands described in their placer survey, and their homestead application, by taking contiguous 40-acre tracts, in
33 sections 7 and 8. Their improvements are reported to be of the value of $500 and consist of two large barns, a good house and substantial outbuildings.

Serve notice and make report, in accordance with circular of March 1, 1900 (29 L. D. 649).

Very respectfully,

J. H. FIMPLE,
Acting Commissioner.

(Record and Transcript p. 56.)

Defendants' Exhibit 6 is as follows:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., December 10, 1903.

N.
W. F. S.

Register and Receiver, Rapid City, South Dakota.

SIR: February 15, 1912, Frank L. and Elisha S. Kirk made mineral Entry No. 1267 for the Kirk placer claim, mineral survey No. 1381, embracing portions of sections 7, 8 and 18, T. 4 S., R. 4 E.

Said claim, as surveyed, is about one and one-half miles long with a
average width of approximately 800 feet. By letter "N" of July 18
1903, claimant was allowed sixty days from receipts of notice within
which to show cause why said entry should not be cancele
34 for the reason that the same was not located as near as prac
ticable in conformity with legal subdivisions and for the
reason that Seth Bullock, supervisor of the Black Hills Forest Re
serve, reported that the land is agricultural and not mineral in char
acter there being only a few colors of gold obtained and slight indi
cations of fire clay and no mining improvements have been made
thereon except two shallow shafts 6 and 8 ft. deep and a ditch con
structed to straighten an old creek bed rather than for the develop
ment of the mining claim.

I am now in receipt of your letter of October 8, 1903, transmitting
an affidavit by claimants corroborated by a number of persons fa
miliar with the facts in which it is shown that the land is more
valuable for its deposits of gold and fire clay than for agricultural
purposes and that mining improvements to the value of $500 have
been placed upon said claim. The showing as to the improvements
and mineral character of the land appears to be sufficient but that
relative to the failure to locate the claim as far as practicable in
conformity with legal subdivisions is not sufficient.

Section 2331 of the Revised Statutes provides that all placer
claims located after May 10, 1872, must conform as nearly as
35 practicable with the United States system of public land
surveys and the rectangular subdivisions of such systems.

In the case of the Wood Placer Mining Company (32 L. D. 198)
it was held that——

A placer claim upon unsurveyed public land to be valid must be
located upon the ground in such shape and position as to conform as
nearly as practicable to the United States system of public land sur-
veys and the rectangular subdivisions of such surveys.

See also case of the Miller Placer claim (30 L. D. 225).

At the time of the location of this claim the land was unsurveyed
but at the date of application and entry the above sections had been
surveyed and the survey thereof approved. The reason given by
claimant for the location thereof in the form above indicated is that
the lines for nearly the whole length of the claim follow the rim
of a high, rocky, precipitous range of hills or mountains upon which
there are quartz or granite ledges and no deposits of fire clay and
upon which are found various locations of lode or quartz claims.

The records of this office fail to show that any applications have
been made for the lands adjoining this placer and therefore an ap-
plication to enter the Kirk placer by legal subdivisions of
36 ten acres or more would be accepted. (Record and Tran-
script p. 58.)

The claim as located follows the course of the Pleasant Valley
creek and apparently was located to obtain the land for a short dis-
tance on either side thereof, no effort being made to locate the claim
to conform as nearly as practicable with the rectangular subdivisions
of the public surveys when extended to cover the above sections.

The showing made on behalf of the applicants does not present sufficient reason for their failure to conform their placer location as nearly as practicable to the legal subdivisions of survey. If an amended location had been made after the survey of the above sections to conform to the legal subdivisions and at the time of application claimants desired to exclude any conflicting lodes and excluded the same by metes and bounds.

For the reasons above stated, mineral entry No. 1267 is held for cancellation. So notify claimants and of their right of appeal. Serve notice and make report in accordance with the circular of March 1, 1900. (29 L. D. 649.)

Very respectfully,

J. H. FIMPLE,
Acting Commissioner.

(Record and Transcript p. 59.)

37 Defendants' Exhibit 7 is as follows:

31-495. G. N. B.
JUNE 30, 1904.

Kirk Placer Claim.

The Commissioner of the General Land Office.

SIR: February 15, 1902, Frank L. and Elisha S. Kirk made mineral entry for the Kirk placer claim, survey No. 1381, embracing portions of sections 7, 8 and 18, T. 4 S., R. 4 E., B. H. M., Rapid City, South Dakota.

July 18, 1903, your office directed the local officers to notify the claimants that they would be allowed sixty days from notice in which to show cause why the entry should not be cancelled, for the reason, among others, that the claim does not conform to the system of the public land surveys and the rectangular subdivisions of such surveys. Notice was given claimants.

October 8, 1903, the local officers forwarded to your office an affidavit by claimants, corroborated by the affidavits of a number of persons, to show, among other things, why the location did not more nearly approximate, in shape and position, the system of the public land surveys.

By decision of December 10, 1903, your office cited the decisions of the Department in the cases of Miller Placer Claim (32
38 L. D. 225) and Wood Placer Mining Company (32 L. D. 198) and held the mineral entry for cancellation, because the claim as located does not conform as nearly as practicable to the system of the public land surveys.

The claimants have appealed to the department.

By the record it is shown that the claim was located June 16, 1894, on unsurveyed land; that it contains 157.929 acres; that it is about one and one-half miles long, with an average width of about eight hundred feet; that Pleasant Valley creek traverses its entire length; that the claim is so located that it lies diagonally across the lines of

the public-land surveys, which, since the location, and prior to en
were extended over it. The claim as surveyed November 27-30, 18
The improvements, certified by the surveyor general to con
(61) (Record and Transcript p. 61) of two shafts and 7250 lin
feet of ditching and open placer working are valued at $2,035.
expenditure for improvements is thus much in excess of the amo
required by law, and they are so situated upon the claim that c
formation of the latter with the system of the public land surv
would lead to an exclusion of much of such improveme
39 from the claim. The survey and improvements were m
long prior to the decision (August 15, 1900) in the Mi
case, supra. Whilst in that case a new principle cannot properly
said to have been laid down, yet it is true that theretofore a prac
in a greater or lesser degree to the contrary had prevailed. Wh
not of unreasonable or unconscienable proportions or shape, pla
claims or irregular form, located upon unsurveyed land, were p
mitted to pass to entry.
It is manifest from the official plat that conformity with the s
tem of the public land surveys would so change the proportions a
shape of the claim on the ground as to exclude from the lin
thereof a large part of the improvements made. In view of all
circumstances in this case it is believed that the claim invol
should be specially excepted from the operation of the requirem
in question, and the decision of your office is reversed.
The papers are herewith returned.
Very respectfully, E. A. HITCHCOCK,
Secretary

(Record and Transcript p. 62.)

Defendants' Exhibit 8 is as follows:

40 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., July 15, 1904

"N."
E. B. C.

Register and Receiver, Rapid City, South Dakota.

SIRS: February 15, 1902, Frank L. Kirk and Elisha S. Kirk ma
mineral entry No. 1267 for the Kirk placer claim, mineral sur
No. 1381, under their mineral application No. 1369, which en
embraced portions of sections 7, 8 and 18, T. 4 S., R. 4 E., B. H.
In reference to the above entitled case I enclose herewith a c
of departmental decision of June 30, 1904, reversing the decis
of this office dated December 10, 1903, which held said entry
cancellation for failure to conform to the rectangular subdivisi
of the public survey.
You will advise said entryman hereof and that the case
now be allowed to proceed on its merits.
Very respectfully,

W. A. RICHARDS,
Commissioner

(Record and Transcript p. 60.)

41 Defendants' Exhibit 9 is as follows:

J. H. D. 04540.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C. September 8, 1904.

L & |*) (3-4 L ()" 3-4 N. H. G. P.
178309-1902-N. J. V. W.
54010-1904.
E. B. C.

William A. Nevins and Frank L. Kirk, Protestants, vs. John Bostrom, Claimant.

Involving H. E. No. 6970, F. C. 2794.

Register and Receiver, Rapid City, South Dakota.

SIRS: On November 18th, 1901, Frank L. Kirk and Elisha A. Kirk filed Mineral Application No. 1369 for the Kirk placer claim, containing 157.929 acres, mineral survey No. 1381, and on February 15, 1902, made mineral entry No. 1267 for said claim.

On July 12, 1902, John Bostrom made homestead entry No. 6970 for Lot 8, S. E. ¼ of S. W. ¼ Sec. 5, N. ½ N. W. ¼ of Sec. 8, T. 4 S., R. 4 E., B. H. M., containing 155 acres, a portion of which conflicts with said Kirk placer, and on October 20, 1902, made final entry No. 2794 for said tracts.

42 On October 22, 1902, William A. Nevins and Frank L. Kirk filed a mineral protest against the homestead entry, alleging conflict between said Kirk placer and the Monatomic lode claims and the homestead above described.

By office letter N. of January 2, 1904, said protest was held to be insufficient to warrant favorable consideration and said protestants were granted sixty days from notice in which to file an amended protest against the homestead entry.

On March 21, 1904, there was filed in your office a further protest which you transmitted on the same day.

On March 21, 1904, there was filed in your office a further protest which you transmitted on the same day.

In the course of proceedings relating to said Kirk placer claims the Department on June 30, 1904, upon the appeal (Record and Transcript p. 63) of the mineral claimants held, regarding the lack of conformity of said placer claim to the rectangular subdivisions of the public survey, that—

It is manifest from the official plat that a conformity with the system of public land surveys would so change the proportions and shape of the claim on the ground as to exclude therefrom the limits thereof a large part of the improvements made. In view of

43 all the circumstances in this case it is believed that the claim involved should be specially excepted from the operations of the requirements in question and the decision of your office is reversed.

Inasmuch as the proof relating to said Kirk placer is found regular, the same could now be passed to patent were it not for the conflict with said homestead entry. The mineral application and entry being prior in point of time to the homestead entry, said homestead entryman is hereby granted sixty days from notice hereof in which to show cause, if any exists, why his entry should not be cancelled to the extent of its conflict with the Kirk placer mine, in default of which showing the entry will be cancelled as indicated.

In the affidavits now filed in support of said protest it is in substance alleged that the protestant, William A. Nevins, of Custer City, South Dakota, is the owner of an undivided one-half interest of and in the Monatomic lode mining claims; that said claim was duly located on August 12, 1891, and was a relocation of the ground formerly and for a number of years prior to said 1891 held and worked as the Irvine lode; that notice of location is duly of record; that said Monatomic lode is and at all times since its location was a valid existing location with extensive development work done thereon and was such prior to the settlement of said homestead claim-
44 ant; that said Bostrom never has had possession of said lode claim or any part thereof; that upon said claim at or prior to the year 1888—at which time the same was known as the Irvine Lode—development work had been done and from 100 to 150 tons of ore extracted; that (Record and Transcript p. 64) during the years 1899 to 1900 eight tons of ore were milled, from which free milling values only were saved, returning ten dollars per ton; that a general assay of the ore shows $27 per ton; that the milling value of this character of ore is from $5 to $7 per ton; that the development work consists of numerous excavations, cuts and shafts, among them being a shaft 45 feet in depth, with drift at bottom 20 feet in length to the west, an open cut 250 feet in length with average depth of 10 feet all in quartz, an incline shaft thirty feet in depth, 6 x 10, with other shafts and open cuts; that protestant, W. A. Nevins has been in possession of said lode since the year 1884; that the annual assessment work has been regularly performed on said claim for each year; that the principal vein upon said claim is shown to be from 8 to 10 feet in width and situated for economical working.

In view of the allegations contained in said protest, a hearing must be ordered to determine the character of the ground em-
45 braced in the conflict between said claim and the homestead entry. Accordingly a hearing is hereby ordered and said protestants granted sixty days from notice hereof in which to apply to your office for a summons for hearing at which testimony as to the actual known character of the tract embraced in said mineral claim and in conflict with said homestead entry at and prior to the date of final homestead entry may be submitted, in default of which said protest will be dismissed without further notice from this office. Give due notice hereof to parties in interest and at the proper time report.

Very respectfully,

J. H. FIMPLE,
Acting Commissioner.

(Record and Transcript p. 65.)

Defendants' Exhibit 10 is as follows:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., October 18, 1906.

"N."
C. C. H.

Contest No. 2175.

William A. Nevins, Frank L. Kirk, vs. John Bostrom.

46 Register and Receiver, Rapid City, South Dakota.

SIRS: February 15, 1902, Frank L. Kirk and Elisha S. Kirk made mineral entry No. 1267 for the Kirk placer claim, survey No. 1381. October 20, 1902, John Bostrom made commuted homestead cash entry No. 2794 for Lot 8, S. E. ¼ S. W. ¼ Sec. 5 and N. ½ N. W. ¼ Sec. 8, T. 4 S., R. 5 E., B. H. M. Said homestead entry conflicted with the Kirk placer to the extent of a portion of the N. W. ¼ N. W. ¼ Sec. 8.

October 22, 1902, William A. Nevins and Frank L. Kirk filed a protest against said homestead entry, alleging the mineral character of the ground covered thereby in conflict with the Kirk placer and the Monatomic lode claim. Subsequently a supplemental protest was filed, and by office letter September 8, 1904, the agricultural claimant was allowed sixty days within which to show cause why his entry should not be cancelled to the extent of the conflict with mineral entry No. 1267, the Kirk placer claim on the ground that the latter was prior in time. On the same day the protestants were allowed sixty days from notice within which to apply for a summons for a hearing to determine the character of the lands in conflict.

47 By office letter of January 13, 1905, it was held that—

Inasmuch as in the case at bar a hearing between the parties is to be had which involves the character of the land, there would appear to be no objection to the homestead claimant at the same time submitting his evidence showing why his homestead should not in part be cancelled, and have all the issues determined at the one hearing.

It appears that you duly issued notice for a hearing setting February 28, 1905, as the date therefor. The parties failed to appear on the date specified, and on March 6, 1905, you rendered a decision finding against the homestead entryman on the rule to show cause and in his favor on the protest involving the Monatomic lode. Thereafter, upon the filing of a sufficient explanation as to why default was made, and a stipulation requesting the fixing of another date for the submission of the testimony, you set May 8, 1905, as the date when the parties should appear. On the day named, the parties appeared with witnesses and testimony was submitted. December 12, 1905, you rendered a decision in which you held as follows:

We have carefully considered the testimony adduced at the trial

and after an examination thereof, now make and file the fol-
48 lowing findings of fact and conclusions of law, viz:

1. That the land embraced in the conflict between said homestead entry and the Monatomic lode claim is agricultural in character and most valuable for that purpose.

2. That the land embraced in the conflict between the Kirk placer and the Bostrom homestead is agricultural in character and most valuable for that purpose. (Record and Transcript p. 66.)

Conclusions.

1. We recommend that the protest of William A. Nevins and Frank L. Kirk, as locators of the Monatomic lode and protestants, be dismissed and that portion of said homestead which conflicts with said lode claim be held intact.

2. We recommend, pursuant to the aforesaid stipulation, that (66) that portion of the Kirk placer conflicting with the Bostrom homestead be segregated.

3. We recommend that the Bostrom homestead, No. 6970 upon which final receipt No. 2794 issued, be held intact and patent duly issued therefor.

January 24, 1906, the protestants duly appealed, and with your letter of February 1, 1906, you forwarded the record to this office.

The Monatomic lode conflicts with the homestead in the
49 S. E. ¼ S. W. ¼ of Sec. 5, and the Kirk placer covers a portion of the N. W. ¼ N. W. ¼ Sec. 8, Said T. 4 S., R. 4 E., B. H. M. The greater portions of the placer claim extends in a southwesterly direction from said N. W. ¼ N. W. ¼ Sec. 8, and is embraced in mineral survey No. 1381. It is shown by the testimony that the greater portion of the subdivision containing the conflict is valuable for agricultural purposes, the most of it being fit for cultivation. The placer claimants attempted to show that the mining claim was valuable for its deposits of placer gold and of fire clay, and known to be so valuable prior to the date of the allowance of final homestead cash entry. The witnesses testified to panning the ground contained within the exterior boundaries of the placer and particularly that portion in conflict, and state that colors were always found in these pannings. It was also testified that underlying the gravel in which the deposits of gold are said to be contained, is a bed of fire clay of good quality. It is in evidence, however, that no mining operations to amount to anything, have ever been conducted upon any portion of the Kirk placer, and no gold in excess of $1.00 in value has ever been taken therefrom by the placer claimants, during all the years it has been held by them.

50 Introduced as exhibits were several small bricks made from the clay on this land and some mixed with fire clay brought from other places, the whole being burned for the purpose of showing their resistance to extreme heat. While these bricks appear to possess some valuable qualities, it does not appear that the clay was discovered on this land and recognized as such prior to the date of

e final agricultural entry, or that the deposits of clay on the Kirk acer possess any special value, as it is in evidence that practically e whole country thereabouts in underlaid with similar deposits. stead of being used for placer mining purposes, the land covered the Kirk placer survey has been used for many years by the Kirk others for agricultural purposes. In a report dated April 18, 1903, e forest ranger reported that the improvements on the placer ining location consisted of a six room house 22-34½ ft., frame ilk house 12-36 ft., log tool house 16x34 ft., two frame rns with stone basements, one 32x40½, the other 30x42½ ft., nd a frame shed, 12x36 ft. It is also stated that 140 acres of the nd is suitable to tilling, 125 acres being under plow, the total area the placer, as surveyed, being 157.929 acres. It is also stated in said report, that during the past season there has been raised on the ground 3200 bushels of grain, 15 tons of hay, and 150 bushels of potatoes.

The testimony taken at this hearing corroborates the report of e forest ranger, so far as the character of the land is concerned. ie land is level, a considerable portion with deep, rich soil and of nsiderable value for agricultural purposes. The placer claimants e farmers, and seem to have been engaged exclusivly in that oc- pation. I am satisfied that for agricultural purposes the land is far greater value than it is for the mineral it contains. The uthern half of the Monatomic lode claim is stated by the witnesses be situated upon the homestead claim, and this portion is suit- le for cultivation, a portion thereof having been plowed by the ricultural claimant. The mining improvements, which are quite tensive, are situated upon that portion of the lode claim outside the subdivision in controversy. It appears from the testimony at there are several (Record and Transcript p. 67) small veins sclosed there and some ore has been milled. This ore is stated have paid the expenses of mining and milling the same, but it not shown that it yielded any profit. The out-croppings of the ins disappear before the subdivision in conflict is reached, and it seems to be the opinion of the agricultural claimant's wit- nesses that the veins do not extend that far. It is the theory of the mineral claimants that the ledge containing these ins dips under the land in controversy so that the same are not own upon the surface, but they have taken no steps to demon-trate at this theory is correct.

While the showing made as to the northern portion of the lode such as would require the classification of the same as mineral character, I am not satisfied that the south half of the lode claim of any value for mining purposes. For the reasons stated, that rtion of your decision finding the land in conflict between the mestead entry and the mining claims described to be agricultural character is correct and must be affirmed. I am unable, how- er, to find in the record any stipulation which would indicate that is the intention of the parties to segregate from the homestead try that portion covered by the Kirk placer. This being so, your nclusions are contradictory in terms and cannot be sustained.

Besides, no matter if such stipulation had been filed, there would be no warrant in excluding or segregating a portion of the homestead in favor of a mineral claimant, the land being agricultural in character, as properly decided by you. Again, if that portion of the homestead, containing the Kirk placer were segregated there
53 is no basis for your recommendation that cash entry No. 2794 be held intact and patent duly issue therefor.

Accordingly, your decision is modified, and it is held that the land in conflict between homestead entry and the Kirk placer and the Monatomic lode is agricultural in character.

You will so advise the parties, and that if this action become final, the Kirk placer claim, mineral entry No. 1267 will be cancelled to the extent of that portion thereof in the N. W. ¼ N. W. ¼ Sec. 8, T. 4 S., R. 4 E., B. H. M., and cash entry No. 2794 be allowed to proceed to patent without reference to the conflict with the Monatomic lode.

In due time report.

Very respectfully,

G. F. POLLOCK,
Acting Commissioner.

F. N. 13.

(Record and Transcript p. 63.)

Defendants' Exhibit 11 is the same as Plaintiff's Exhibit D. (Record and Transcript p. 69-71.)

Defendants' Exhibit 12 is as follows:

4-108*a*.

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE,
RAPID CITY, SOUTH DAKOTA, February 13th, 1911.

Frank L. and Elisha S. Kirk, Custer, S. D.

54 By authority of General Land Officer letter "P" of Aug. 18, 1910.

Dec. 17, 1910. You are hereby notified that a special agent of that office has filed the following charges against the validity of your mineral entry No. 020366, made February 15th, 1902, for the Kirk placer for Lot 1381, embracing 157.929 acres in Secs. 7, 8 and 18, T. 4 S., R. 4 E., B. H. M., to-wit: 1st. That the land embraced in said entry is not mineral in character. 2nd. (Additional charge by Letter "P" of December 17th, 1910.) That development work to the amount of five hundred dollars has not been performed on said claim. (Answer must be filed in duplicate.)

You are notified that if you fail to file in this office, within thirty days of the date of service of this notice, a written or printed answer, under oath, denying each of said charges, or showing a state of facts rendering said charges immaterial, and applying for a hearing to determine the truth of said charges and answer, or if you fail

to appear at a hearing applied for, your said above entry or claim will be rejected, and if of record, will be cancelled.

Very respectfully,

LOOMIS S. CULL, *Register.*

5946.
C. F. M.

(Record and Transcript p. 73.)

55 *Findings.*

And the court upon such trial made and entered the following Findings of Fact and Conclusions of Law. (Record and Transcript, page 104.)

This matter having been brought on for hearing pursuant to written stipulation of both parties, before the Court at the Court House in the City of Hot Springs, Fall River County, South Dakota, at the adjourned April, 1913, term on the 25th day of April, 1913, upon the complaint of the plaintiff, Amended Answer and Cross-Complaint of the defendants, and the Demurrer and Reply of plaintiff, the said Demurrer of the plaintiff having been overruled and the case thereupon having been tried to the Court without a jury, Messrs. Wilson & Wilson appearing for the plaintiff and Ed. L. Grantham, Esq., appearing for the defendants; and proof having been submitted by the plaintiff in support of the allegations of his complaint, and by the defendants in support of the allegations of the Amended Answer and the Court having heard the proof adduced for both plaintiff and defendants and the arguments of counsel; and the Court having fully considered the same and being fully advised in the premises, now makes and filed herein the following Findings of Fact, to-wit:

56 *Findings of Fact.*

I.

The Court finds that the plaintiff, Hans Olson, is now and has been since the 3d day of February, 1912, seized in fee and entitled to the possession of the following described lands and premises, situated in the County of Custer and State of South Dakota, to-wit: Lots (Record and Transcript p. 102) Eight (8) and Eleven (11), in Section Five (5), and the North Half of the Northeast Quarter (N. ½ N. E. ¼), of Section Eight (8), all in Township Four (4) South, Range Four (4) East, B. H. M., containing 149.98 acres more or less.

II.

The Court further finds that the defendants in this action and each of them claim to have some estate or interest in or lien or incumbrance upon the said premises or some part thereof, adverse

to this plaintiff, and that under said claim said defendants are now and have been since the said 3d day of February, 1912, wrongfully in possession of said premises or some part thereof.

III.

The Court further finds that said claim on the part of the said defendants and each of them, is wrongfully and without any right whatever, and that the said defendants have not nor has
57 either of them any estate, right, title or interest in or any lien or incumbrance on said premises or any part thereof.

IV.

The Court further finds that the value of the rents, issues and profits of that portion of said premises so wrongfully withhold from the possession of the plaintiff by the said defendants as aforesaid, from the 3d day of February, 1912, and while the plaintiff has been excluded therefrom by the said defendants as aforesaid, is the sum of Fifty Dollars ($50.00).

Conclusions of Law.

I.

As conclusions of law from the foregoing Findings of Fact the Court finds and decides:

That the plaintiff is entitled to be adjudged and decreed to be the owner in fee simple of the lands and premises hereinbefore described, and all thereof, and that said plaintiff is further entitled to have the title to said lands quited in him against all claims, demands and pretensions of the said defendants and each of them; and that a (Record and Transcript p. 103) decree should be entered, adjudged that the said defendants have no estate, right, title or interest in or lien or incumbrance upon the said premises or any part thereof.

58 II.

That plaintiff should have and recover the immediate possession of the said premises and every part thereof.

III.

That plaintiff should be awarded damages against the defendants for the sum of Fifty Dollars ($50.00), together with his costs and disbursements herein.

Let judgment be entered accordingly.

Dated at Rapid City, South Dakota, this 31st day of December, A. D. 1913.

By the Court.

LEVI McGEE, *Judge.*

Attest:

[SEAL.] HENRY WAY, *Clerk.*

(Record and Transcript p. 104.)

Decree.

And thereon entered the following Decree.

This matter having been brought on for hearing before the Court pursuant to stipulation of both parties, at the Court House in the City of Hot Springs, Fall River County, South Dakota, at the adjourned April, 1913, term, on the 25th day of April, 1913, upon the complaint of the plaintiff, the Amended Answer and Cross-Complaint of the defendants, and the Reply of the plaintiff, and the case having been tried to the Court without a jury,
59 Messrs. Wilson & Wilson appearing for the plaintiff and Ed. L. Grantham, Esq., appearing for the defendants; and proof having been submitted for the plaintiff in support of the allegations of his complaint and by the defendants in support of the allegations of their amended answer and Cross-Complaint, and again by the plaintiff in support of his Reply, and the Court having heard the proof adduced for both plaintiff and defendants and the arguments of their respective counsel, and having fully considered the same, and the Court having made and filed its written Findings of Fact and Conclusions of Law herein, and being fully advised in the premises;

It is hereby ordered, adjudged and decreed:

1st. That the above named plaintiff, Hans Olson, is the owner in fee simple of the land described in his complaint, to-wit, Lots Eight (8), and Eleven (11), in Section Five (5), and the North Half of the Northeast Quarter (N. ½ N. E. ¼ of Section Eight (8), all in Township Four (4) South, Range Four (4) East, B. H. M., containing 149.98 acres more or less. That the title thereto is hereby quited in him against all claims, demands and pretensions of the said defendants and each of them, their heirs, administrators, executors and assigns. (Record and Transcript p. 99.)

60–62 2d. That none of the said defendants have any estate, right, title or interest in or lien or incumbrance upon the premises herein described or any part thereof.

3d. That the plaintiff have and recover immediate possession of said premises and every part thereof.

4th. That the plaintiff have and recover damages against the said defendants in the sum of Fifty Dollars ($50.00), and in the additional sum of $....., his costs and disbursements herein, said costs and disbursements to be hereafter taxed by the Clerk of this Court according to law and inserted in this judgment.

Done in open court in the City of Hot Springs, Fall River County, South Dakota, this 31st day of December, A. D. 1913.

By the Court,

LEVI McGEE, *Judge.*

Attest:

[SEAL.] HENRY E. WAY, *Clerk.*

(Record and Transcript p. 100.)

* * * * * * *

63 *Appeal.*

And thereafter and on the 16th day of June, 1914, the defendants duly served upon attorneys for plaintiff and upon the Clerk of the Circuit Court of Custer County, South Dakota, their notice of appeal in words and figures following, to-wit:

To the above named plaintiffs and to Messrs. Wilson & Wilson, his attorneys:

Please take notice, That the defendants, Frank L. Kirk, Elisha S. Kirk, and Elma E. Kirk, appeal to the Supreme Court of the State of South Dakota, from a judgment and decree of the above named circuit court, dated and entered on the 31st day of December, A. D. 1913, in favor of the plaintiff and against the defendants, and from the order of the court denying and overruling defendant's motion for a new trial, made and entered herein on the 21st day of May, A. D. 1914, and from the whole thereof.

Dated this 16th day of June, 1914.

ED. L. GRANTHAM,
Attorney for Defendants, Aberdeen, South Dakota.

Undertaking on Appeal.

And thereafter and upon the same date, to-wit, on the 16th day of June, 1914, the defendants duly served upon attorneys
64 for plaintiff an undertaking on appeal and supersedeas bond on appeal, in due form as provided by law and filed the same together with the notice of appeal so served as aforesaid in the office of the Clerk of the Circuit Court of Custer County, South Dakota, thereby perfecting the defendants' appeal from the judgment and decree of the court and order denying defendants' motion for new trial herein.

That such transcript of testimony together with said specifications of error, judgment roll, and exhibits were duly certified by the Judge who tried the case as the settled record for the purpose of motion for new trial and appeal.

Assignment of Error.

And the appellant herein says there is manifest error on the face of the record, in this:

I.

The Court erred in its finding numbered one, wherein for the reason that the same is a conclusion of law and not a finding of fact, and the same is unsupported by the evidence in the case and is contrary to the evidence.

II.

The Court erred in its finding numbered two, to the effect that the defendants are now and have been since February 3, 1912, wrongfully in possession of said premises or some part thereof, for
65 the reason that the same is a conclusion of law and not a finding of fact, and the same is not supported by the evidence in the case and is contrary to the evidence.

III.

The Court erred in its finding numbered three for that the same is a conclusion of law and not a finding of fact and is not supported by the evidence and is contrary to the evidence in the case, and not within the issues in the case.

IV.

The Court erred in its conclusion of law numbered one, for that the same is not supported by any finding of fact, nor by any evidence, and is against the evidence in the case and against law.

V.

The Court erred in its conclusion of law numbered two, for that the same is not supported by any finding of fact in the case, is not supported by any evidence, and is contrary to the evidence and against law.

VI.

The Court erred in its conclusion of law numbered three, for that the same is not supported by any finding of fact in the case, is contrary to the evidence and against law.

VII.

The Court erred in its entry of judgment herein for that
66 the same is not supported by any finding of fact; is not supported by the evidence in the case, and is against law.

VIII.

The Court erred in its failure and refusal to find that the Kirk placer mining claim was at the time of the making of the homestead entry of the grantor of the plaintiff a valid and subsisting mining claim; and erred in not further finding that at all times prior to and at the date of the issuance of the patent the Kirk placer mining claim was a valid and subsisting mining claim, for that the undisputed evidence shows that long prior to the making of said homestead entry the Kirk placer claim had been duly located and entered for final patent, and receiver's receipt therefor duly issued

prior to the making of such homestead entry, and thereupon an
thereafter the United States government held title in trust for th
defendants here, and not otherwise.

IX.

The Court erred in its failure and refusal to find that at the dat
of the homestead entry of the grantor of the plaintiff all that portio
of said homestead entry included within the lines of the Kirk place
mining claim, the same being the land in controversy, was segregate
from the public domain and not open to settlement, sale o
67 other disposition by the government except to the defendant
Frank L. and Elisha S. Kirk, under their mineral entry o
the Kirk placer mining claim.

X.

The Court erred in failing to enter its judgment and decree decree
ing the property in controversy to be the property of the defendant
Frank L. Kirk and Elisha S. Kirk, under and by virtue of the min
eral entry of the Kirk placer mining claim.

XI.

The findings and decision of the Court are against the evidenc
and against law.

XII.

The Court erred in failing to find that the plaintiff acquired no
right, title or interest in or to the property in controversy by the deed
from John Bostrom, his grantor, for the reason that the plaintif
took said deed and transfer with full knowledge of all the infirmities
of the title and no doctrine of estoppel will operate in his favor.

XIII.

The Court erred in finding that the plaintiff was the owner of the
property in controversy for the reason that under the law under
which the homestead entry of the grantor of the plaintiff un-
68 der which he claims title was made it was required that the
entryman be at the time in the actual possession of the prop-
erty and occupying the same, when in truth and fact the plaintiff's
grantor was never at any time in possession of the property in con-
troversy, and was at no time under the law entitled to make entry
thereof; wherefore such entry and subsequent muniments of title of
plaintiff's grantor were invalid and of no effect, and the plaintiff
thereunder has no right, title or interest in said premises.

XIV.

The evidence is insufficient to support the findings of fact, conclu-
sions of law and judgment and decree in the following particulars:

1. There is no evidence that the lands in controversy at the time of filing of the plaintiff's grantor homestead entry were unappropriated public lands of the United States, but on the contrary the evidence shows that the same had already been appropriated by the defendants under their location of the Kirk placer claim, and the entry thereof in the United States Land Office and the payment of the purchase price therefor prior to said homestead entry, which said entry had not at any time been cancelled.

2. There is no evidence that at the time of the making of final proof under his homestead entry by the plaintiff's grantor
69 the said premises were unappropriated public lands in the United States subject to homestead entry, but the evidence shows that at such time the same had been appropriated by the defendants under the location of the Kirk placer claim and the entry thereof for patent in the United States Land Office at Rapid City, and the payment of the purchase price therefor to the Receiver of the Land Office, under which the United States held title in trust for the defendants.

3. The evidence conclusively shows that the lands and premises in controversy at the time of the making of the homestead entry by the plaintiff's grantor, and at the time of the making of the final proof thereof, and at the time of the issuance of the patent therefor, the said lands and premises had been appropriated by the defendants under the location of the Kirk placer claim and entry thereof for patent in the United States Land Office, and the payment of the purchase price thereof, and that the same had thereby been segregated from the public domain and were not subject to homestead entry or sale by the United States.

4. The evidence conclusively shows that at the time of the making of the homestead entry by the plaintiff's grantor, and at the
70 time of the making of the final proof thereunder, and at the time of the issuance of the patent therefor, the lands and premises described in the complaint did not belong to and were not the property of the United States, and that the United States held the title in trust for the defendants under the location, entry, and sale thereof as a part and portion of the Kirk placer claim.

That the findings of facts are not supported by the evidence but are against the evidence and the findings and judgment are against each.

XV.

The Court erred in denying defendant's motion for new trial wherefore defendants and appellants pray that the findings in judgment be in all things vacated and set aside and that the judgment of the Court be reversed, likewise the order denying defendants' motion for new trial and that a new trial of this case be granted for the manifest errors and reasons aforesaid.

ED. L. GRANTHAM AND
C. C. CROAL,
Attorneys for Appellants.

71 *Statement of the Case.*

In the N. ½ of the N. W. ¼ of Section 8, Township 4 South, Range 4 East, B. H. M., is a tract of land described by metes a bounds, courses and distances, containing 19.439 acres, (Folio 91 comprising a portion of the Kirk Placer claim. This entire sub vision is described in the patent to what is referred to as the Bostr homestead, situated in the Black Hills Forest Reserve.

The defendants have been in possession to the exclusion of plaintiff and the grantors since 1894. Neither the plaintiff nor grantors have at any time been in possession of any portion of lands in conflict.

Plaintiff relies upon the patent to the Bostrom homestead and mands possession. Defendants rely upon the location, entry and ceiver's receipt for the purchase of the Kirk Placer mining clai

On the 9th day of June, 1894, (Exhibit 1, folio 77) the K Placer was located, and on the 16th day of June, 1894, notice of location thereof was duly filed in the office of the Register of De of Custer County, South Dakota. Thereupon and there

72 the lands described in the entry of the Kirk Placer claim w appropriated by Frank L. Kirk and his co-locators.

Thereafter and to make a more perfect description of said la and to more fully comply with the law respecting the location placer mining claims, Frank L. Kirk, Elisha S. Kirk and their locators on the 2nd day of October, 1899, (Exhibit 2, folio 78-8 made amended location of said placer claim and duly filed certific thereof in the office of the Register of Deeds of Custer County, Sou Dakota, on the 10th day of October, 1899.

Thereafter and on the 18th day of November, 1901 (Exhibit folio 84-86), Frank L. Kirk and Elisha S. Kirk made Mineral A plication No. 1369 for the Kirk Placer, designated as Mineral surv No. 1381, comprising 157.929 acres, for which Receiver's Receipt w issued, and upon which the Register of the Land Office certified th said application was free from conflict with any existing applicati or entry and was vacant land subject to such appropriation, as a peared from the examination of the records of the land office, (E hibit 3).

Thereafter, on the 15th day of February, 1902, Frank L. Ki and Elisha S. Kirk made final proof and paid $395.00,

73 full payment for the Kirk Placer, comprising 157.929 acr and received therefor a Receiver's Receipt (Exhibit 4, fol 87-88), thereby acquiring the ownership by purchase from the Unit States of the lands embraced within the Kirk Placer claim.

On July 12, 1902, five months after the sale of the Kirk Plac and while the entry was intact and the validity thereof uncha lenged by the government in any manner, John Bostrum made hom stead entry for certain lands, embracing that portion of the Ki Placer in controversy in this action (Folio 123).

On October 20, 1902, John Bostrum made final entry No. 27

for his homestead entry, including the lands in controvery (Folio 55-56).

On October 22, 1902, William A. Nevin and Frank L. Kirk filed a protest against the homestead entry, alleging conflict between the homestead entry and the Monatomic lode and the Kirk placer claims (Folio 124-125).

On July 18, 1903, and after the filing of the Bostrum homestead and subsequent to the making of final proof, and subsequent to the filing of the protest against the homestead entry, the Honorable Commissioner directed the owners of the Kirk Placer claim to show cause why the Kirk Placer should not be cancelled (Exhibit
74 5) upon the following grounds: (1) That the same does not conform to the legal subdivisions, (2) That the land is agricultural and not mineral in character, (3) That the improvements are not of a character to develop a mining claim or mineral entry (Exhibit 5, folio 90-97).

On December 10, 1903, the Honorable Commissioner of the General Land Office, upon such hearing, held: "That showing as to the improvements and mineral character of the land appears to be sufficient, but that relative to the failure to locate the claim as far as practicable in conformity with the legal subdivisions is not sufficient." (Exhibit 6, folio 98-108.)

On June 30, 1904, (Exhibit 7, folio 109-117) the Honorable Secretary of the Interior, upon the appeal of the owners of the Kirk Placer from that part of the decision of the Honorable Commissioner holding said placer entry for cancellation for failure to conform to the legal subdivisions, overruled the decision of the Honorable Commissioner appealed from, as to that feature.

On July 15, 1904, (Exhibit 8, folio 118-120) the Honorable Commissioner of the General Land Office, in conformity with the decision of the Secretary, dismissed the proceedings and ordered the matter of application for patent to the Kirk Placer to proceed.
75 This is the last entry and the last order made wherein the validity of the Kirk Placer was in anywise involved, and the last proceeding of which Elisha S. Kirk, one of the owners of the Kirk Placer was a party or had any notice, prior to this action.

On September 8, 1904, (Exhibit 9, folio 127-128) the Honorable Commissioner of the General Land Office, with reference to the proceedings and protest against the homestead entry made by William A. Nevin and Frank L. Kirk, recites: "Inasmuch as the proof relating to said Kirk Placer is found regular, the same could now be passed to patent were it not for the conflict with the said homestead entry. The mineral application and entry being prior in time to the homestead entry, said homestead entryman is hereby granted sixty days from notice hereof in which to show cause, if any exists, why his entry should not be cancelled to the extent of its conflict with the Kirk Placer mine, in default of which showing the entry will be cancelled as indicated."

The Commissioner ordered (Folio 127-133), a hearing to determine as to the conflict between the Monatomic lode claim and the Bostrom homestead, but no order for hearing was made in the matter of the

conflict between the Kirk Placer and the Bostrom homestead.
76 Neither Elisha S. Kirk nor Frank L. Kirk had any part of interest in the hearing of matter of the conflict between the Kirk Placer and the Bostrom homestead. It was simply an order, requiring the homestead entryman to show cause and was based purely and simply upon the priority of a placer entry. An ex parte matter.

On October 18, 1906 (Exhibit 10, folio 135-158) the Honorable Commissioner, in the matter of the protest of William A. Nevin and Frank L. Kirk, dismissed the protest of William A. Nevin and Frank L. Kirk as locators of the Monatomic lode and recommended a segregation of the part of the Kirk Placer in conflict with the Bostrom homestead, and recommended patent.

On June 7, 1907, the Honorable Secretary of the Interior, in the same case, (Exhibit 11, folio 55-69) reversed the order of the Commissioner of the General Land Office as to the conflict between the Bostrom Homestead and the Monatomic lode claim and ordered the Monatomic lode claim to be segregated from the Bostrom Homestead. With reference to the Kirk Placer the Secretary recites the evidence given by the homestead entryman and the findings of the Register and Receiver thereon and says: "The homestead entry was wrongfully allowed, as to the conflict with the prior placer
77 entry, but inasmuch as it has been shown that the land in the forty-acre subdivision in which the conflict exists is not mineral in character, the placer entry will be cancelled to the extent of the conflict and the homestead entry may be permitted to proceed with respect thereto so far as the government is concerned, provided no intervening rights have attached." (Folio 67-68.)

On May 15, 1909 (Plaintiff's Exhibit E, folio 70) the Commissioner of the General Land Office ordered a segregation survey of the Monatomic lode claim and also an amended survey as to the Kirk Placer. In the same exhibit, under date of September 24, 1910, the Honorable Secretary, on review, ordered the exclusion from the placer of the land in controvery being 19.37 acres.

Under date of March 24, 1910 (Folio 73-74), the Commissioner of the General Land Office made its order cancelling the Kirk Placer entry to the extent of its conflict with the Bostrom homestead entry.

Under date of February 11, 1911 (Folio 74-75) the Commissioner of the General Land Office made certificate approving the plat of the Kirk Placer as amended by the segregation.

It will be observed that all proceedings and orders subsequent to June 7, 1907, have been made on authority of that de-
78–108 cision, without new or additional notice, but simply carrying out the provisions of the order in Exhibit 11.

It is undisputed in the evidence by the plaintiff himself that the plaintiff in this action, the grantee of the homestead entryman, knew that his grantor had never been in possession of the land in dispute; that it was claimed by the defendants, who for years had been in possession under the Kirk Placer location; that he was a witness for the homestead claimant, and knew that the land in controversy was in conflict between the homestead entry and the

Kirk Placer; that he did work upon the placer for the Gold Star Mining Company, when in the employ of that Company, (Folio 35-38).

* * * * * * *

109 *Completion of Record.*

The following additional statements as to the contents of the record in the above entitled action are made under the provisions of Chapter 172 of the Session Laws of 1913, in order that the Court may be fully informed as to the exact situation in this case:

Folio 5, Appellants' Brief: In connection with the Amended Answer, Ed. L. Grantham filed an Affidavit (pp. 118 and
110 119, settled record), a portion of which is as follows: "Ed L. Grantham being first duly sworn, deposes and says I am attorney for the defendants herein and have been attorney for them and in charge of the matter of title of the Kirk Placer claim since about 1902 or 1903, and have had charge of the proceedings in Land Office and in the Department of the Interior with reference thereto."

Folio 28, Appellants' Brief:

Demurrer.

Plaintiff demurred to defendants' Answer and Cross-Complaint as to the paragraphs numbered I, II, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, "for the reason that the same does not state facts sufficient to constitute a legal defense to the Complaint of the plaintiff, and for the further reason that the matters and things therein referred to have already been adjudicated by the United States through the General Land Office thereof, and that patent to the lands in controversy has been issued to the plaintiff's grantor and that this Court has no jurisdiction to try and determine the same as said Amended Answer and Cross-Complaint shows upon the face thereof" (pp. 111-113, settled record).

111 This Demurrer was overruled pro forma by the Court at the time of the trial (p. 14, settled record), and when decision in favor of plaintiff was rendered, the Court overruled the Demurrer, to which order and ruling exception was duly taken (p. 109, settled record).

Folio 29, line 9, Appellants' Brief: N. ½ N. E. ¼ should read N. ½ N. W. ¼ (p. 2, settled record).

Folio 34, Appellants' Brief: Plaintiff also testified as follows: "This is practically all farming land and has been put into crops by the Kirks for the last year and prior to that. I have put in crops on adjoining land which is of the same character as the land in controversy. On this land I raised fifty bushels of oats to the acre by machine measurement, which was worth about 32c. a bushel" (p. 5, settled record).

Folio 36, line 7, Appellants' Brief: It does not appear from an examination of the transcript that the plaintiff testified "I knew this

land was embraced in the conflict." He does say, however, (p. 10) "Yes, I know they were claiming it."

Folio 37, line 1, Appellants' Brief: The word "contest" should be "conflict" (p. 10, settled record).

Folio 39, Appellants' Brief: Newberg testified that the
112 usual contract of land is half the crop if the renter furnishes the seed. If the owner furnishes the seed the renter gets one-third the crop. There have been forty to fifty bushels of oats to the acre raised on the land in controversy, which is worth from 90c. to $1.00 a hundred (p. 13, settled record).

Folio 50, Appellants' Brief: "Mr. Olson" should be "Mr. Durber" (p. 24, settled record).

Folio 51, line 2, Appellants' Brief: "January" should read "June" (p. 33, settled record).

The following from Certificate of Register and Receiver of the Rapid City Land Office, dated March 21, 1913, received in testimony pursuant to stipulation of counsel, is omitted:

"It is further certified, That the action now pending in this office between the United States and Frank L. and Elisha S. Kirk, involving mineral entry 020366 (M. E. 1267) is upon charges by the United States that the land now contained in said placer (M. E. 020366) is not mineral and that a sufficient amount of development work has not been performed on said land" (p. 38, settled record).

Folio 51, line 3, Appellants' Brief: Letter of February 24, 1910,
is from the Commissioner of the General Land Office to
113 United States Surveyor-General at Huron (p. 41, settled record).

Folio 61, line 8, Appellants' Brief: The following words are omitted: "finding of the local officers as to the conflict between" (p. 34, settled record).

Folio 70, Appellants' Brief: The commencement of this letter is as follows:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., May 15, 1909.

Address only the Commissioner of the General Land Office.

William A. Nevin, Frank L. Kirk and Elisha S. Kirk vs. John Bostrom.

Contest 2175. H. E. F. C. 2794 and M. E. 1267. Part cancellation of each made and contest closed." (p. 39, settled record.)

Letter of February 24, 1910, from the Commissioner of the General Land Office to the United States Surveyor-General at Huron, omitted (Folio 73, Appellants' Brief.) Said letter is as follows:

'DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., Feb. 24, 1910.

Address only the Commissioner of the General Land Office.

11 Ex parte Frank L. Kirk and Elisha Kirk.

Kirk placer M. A. 1369, M. E. 1267. M. S. 1381.
Amendment of survey.

United States Surveyor General, Huron, South Dakota.

SIR: Mineral entry 1267, for the Kirk placer was cancelled May 5, 1909, as to the portion situate in the N. W. ¼ of N. W. ¼ Sec. 8, T. 4 S., R. 4 E., B. H. M., and an amended survey was required to eliminate the cancelled portion.

In a letter to the local office, December 4, 1909, it was stated that there was not sufficient data in this office from which to direct amendment of the survey by metes and bounds and areas, and, therefore, application should be made to your office as directed in the letter of May 15, 1909.

Messrs. Grantham and Mathias, of Custer, S. D., local attorneys for the claimants, have asked for review.

Reference is made to amended township plat, approved September 16, 1904, which segregates the Kirk placer, M. S. 1381, from the N. W. ¼ of the N. W. ¼ and after defining the boundaries of the placer designates the remainder as lot 1 containing 20.63 acres, and it is argued that the area to be excluded from the placer is
15 the balance, 19.37 acres, of the 40 acre legal subdivision.

It must be kept in mind that it was an amended survey of the placer which was required and not a segregation of the placer from the 40 acre tract. The amended survey is required that the placer may be definitely described in the patent by metes and bounds, showing the particular tract excluded. It would not answer to describe the whole claim and then exclude that portion in conflict with the 40 acre tract unless the description showed all the points of intersection with the boundaries of the forty, which it does not do—the points of intersection of the exterior lines of the placer with the south and west lines of the 40 acre tract are not given in the field notes, or on the plat.

Considering, however, that the survey 1381, is connected with the public survey from corner No. 1, which is within the N. W. ¼ of N. W. ¼ and that to amend the survey upon the ground would involve the running of new tie line and the establishment of new corners, and would also eliminate present corners 1, 2 and 3, which would destroy the consecutive numbering of the corners, the survey may be amended in your office. The amendment should show bearings to the west quarter corner of the northwest quarter of section 8, from intersection of line 15 with the south line of
16 the N. E. ¼ of N. E. ¼ Sec. 7, and the west line of N. W. ¼ N. W. ¼ Sec. 8, and from intersection of line 3 with the south line of the N. W. ¼ of N. W. ¼ Sec. 8. And it would seem the more practical, and without material loss to the claimants, if the

north boundary of the claimed placer ground were made coincident with the south lines of the N. E. ¼ of N. E. ¼ of Sec. 7, and N. W. ¼ of N. W. ¼ Sec. 8, thus eliminating the few feet in the N. E. ¼ of N. E. ¼ Sec. 7, and that plan will be adopted should the claimants asquiesce therein.

The plat is inclosed under separate cover and upon satisfactory deposit being made, you will make the amendments thereon, with a distinctive ink, and prepare the corresponding additional sheet of field notes attaching to each your certificate.

Very respectfully,
(Signed) S. V. PROUDFIT,
Assistant Commissioner."

(Settled record, pp. 41-43.)

Folio 77, line 1, Appellants' Brief: The tax receipt for 1912 is to Hans Olson instead of John Bostrom (p. 51, settled record).

Folio 94, between lines 3 and 4, Appellants' Brief, the following is omitted: "show cause why said entry should not be can-
117 celled, advising them that in default thereof and in the" (p. 56, settled record).

Folio 107, line 6, Appellants' Brief: The following is omitted between the words "conflicting" and "lodes;" "claims they could have had a proper survey executed of any conflicting" (p. 59, settled record).

Completed Statement of Case.

Appellants' statement of the case on pages 71 to 78 of their Brief requires, in the opinion of respondent, some explanation and completion.

Folio 218, Appellants' Brief: In connection with this paragraph attention is called to the fact that Bostrom's homestead entry was made under the provisions of special statutes relative to homestead entries in forest reservations, and within a few months after the date of the passage of the last act regarding such entries (Folios 55-56, Appellants' Brief). That there had been residence upon the land by Bostrom long before he made his entry is evident from the fact that final proof was submitted and final certificate issued within three months and eight days from the date of entry.

Folio 219, Appellants' Brief: Attention is directed to the fact that the requirements of the Commissioner of the General Land Office as herein stated, were made because of a report of
118 the Forest Supervisor on and an examination by the Forest Ranger of the land embraced in the Kirk placer (Folios 92-93, Appellants' Brief) and that the matter of the Bostrom homestead was not then considered by the General Land Office.

Folio 221, Appellants' Brief: There was no "hearing" as stated. The Commissioner's statement as quoted by counsel is based solely upon ex parte affidavits by the Kirks and others. (Folios 101-102, Appellants' Brief.)

Folios 222 and 223, Appellants' Brief: The matter of Bostrom's

homestead entry was not mentioned nor in any way considered by the General Land Office until after July 15, 1904. It should be noted that there was no "hearing," simply a consideration of two questions between the government and the Kirks, which were decided wholly on ex parte affidavits (Folios 102 and 116, Appellants' Brief).

Folios 224 and 225, Appellants' Brief: The Commissioner's letter states: "Accordingly a hearing is hereby ordered and said protestants (plural) granted sixty days from notice hereof in which to apply to your office for a summons for hearing * * * " (Folio 133, Appellants' Brief). And that both protestants—Kirk and Nevins—appeared at such hearing and fully presented
119 their respective claims clearly appears from defendants' Exhibit 10. (Folios 135-158, Appellants' Brief.) In this exhibit (Folios 138-139, Appellants Brief) the Commissioner says: "On the same day the protestants were allowed sixty days from notice within which to apply for a summons for a hearing to determine the character of the lands in conflict. By office letter of January 13, 1905, it was held that—

Inasmuch as in the case at bar a hearing between the parties is to be had which involves the character of the land, there would appear to be no objection to the homestead claimant at the same time submitting his evidence showing why his homestead should not in part be cancelled, and have all the issues determined at the one hearing."

From this it does not seem that the statements (Folios 225 and 226, Appellants' Brief) of appellants' counsel are borne out by the record.

Folio 227, Appellants' Brief: Frank L. Kirk's protest was on behalf of the Kirk placer, as clearly appears from Folios 124 and 137, Appellants' Brief.

Folio 230, Appellants' Brief. By letter N, of February 24, 1910, (Folios 15-23 hereof) the Commissioner of the General
120 Land Office advised the Surveyor-General of this state regarding an amendment of the mineral survey for the Kirk placer, which was necessary in order to exclude that portion of same in conflict with the Bostrom homestead. This letter directed the Surveyor-General to make the amendments on the plat with a distinctive ink.

By letter of February 11, 1911, (Folio 75, Appellants' Brief) the Commissioner amended certificate of entry of John Bostrom so as to exclude a portion of Monatomic Lode and include in said homestead entry that portion formerly in conflict with the Kirk placer.

Plaintiff's Exhibit F (Folio 76, Appellants Brief) is a photographic copy of the official plat of mineral survey No. 1381 for the Kirk placer. This clearly shows the amendment of the survey by the Surveyor General so as to exclude the portion within the N. W. ¼ N. W. ¼, Sec. 8, in conflict with the Bostrom homestead, and also contains the certificate of the United States Surveyor-General that such amendment was made (p. 47, settled record).

Folios 232 and 233, Appellants' Brief: In connection with the

statements in this paragraph attention is called to the testimony of Elisha S. Kirk (Folio 50, Appellants' Brief) as follows: "I changed the fence to run on the line in 1910 as it stands
121–162 now." Plaintiff's grantor made entry and final proof in 1902. Regarding the statement that plaintiff was a witness for the homestead claimant, which statement is made three different times in Appellants' Brief, the record shows (Folio 36, Appellants' Brief) that plaintiff testified "I was a witness for Bostrom when he and the Kirks had a contest on about it."

* * * * * * *

163 And afterwards, to-wit, on the 19th day of February, 1915, said cause and appeal was placed on the calendar of the Supreme Court of the State of South Dakota; and afterwards, to-wit, on the 19th day of March, 1915, said cause was called and submitted upon the written briefs of the respective counsel filed in this Court as aforesaid, and without oral argument of counsel; and that afterwards, to-wit, on the 24th day of July, A. D. 1915, the judgment and decree of the lower court was affirmed by the Supreme Court of the State of South Dakota, and an opinion of the Supreme Court therein filed and entered, which said decision and opinion of the Supreme Court of the State of South Dakota is in words and figures as follows:

164 This copy furnished without charge by courtesy of the Judges of the Supreme Court.

#3670—a—"G."

In the Supreme Court of the State of South Dakota

HANS OLSON, Plaintiff and Respondent,
vs.
FRANK L. KIRK, ELISHA S. KIRK and ELMA E. KIRK, Defendants and Appellants.

Appeal from the Circuit Court of Custer County, Hon. Levi McGee, Judge.

Opinion filed Jul- 24, 1915.

165 Wilson & Wilson, Attorneys for Plaintiff and Respondent.
Ed. L. Grantham, C. C. Croal, Attorneys for Defendants and Appellants.

GATES, *J.*:

In the N. ½ of the N. W. ¼ of Sec. 8, Twp. 4 S., R. 4 E. B. H. M. is a tract of land described by metes and bounds, containing nineteen and a fraction acres, comprising a portion of the Kirk placer claim. The entire eighty acre tract is covered, with other land, by a government patent, to one Bostrom, issued May 25, 1911, under Bos-

trom's homestead entry. The plaintiff is Bostrom's grantee. The defendants are the owners of the Kirk placer claim. The defendants have been in possession, to the exclusion of the plaintiff and his grantor since 1894, of the nineteen acre tract. Plaintiff relies upon the patent and demands possession. Defendants rely upon the location, entry, and the receiver's receipt for the purchase of the Kirk placer claim. This claim was located in 1894. In February 1902, the Kirks made final proof and made full payment for their placer claim and obtained a receiver's receipt. In July 1902, Bostrom made homestead entry upon this eighty acre tract and other lands. The rights of the parties have been the subject of consideration by the local land office; by the Commissioner of the General Land Office, and by the Secretary of the Interior a number of times. A review of these proceedings would not be helpful to a determination of this case. Suffice it to say that in June 1907, the Honorable Secretary of the Interior made a determination
166 which is, in part, as follows:

"The homestead entry was wrongfully allowed, as to the conflict with the prior placer entry, but inasmuch as it has been shown that the land in the forty-acre subdivision in which the conflict exists is not mineral in character, the placer entry will be cancelled to the extent of the conflict and the homestead entry may be permitted to stand with respect thereto so far as the government is concerned, provided no intervening rights have attached."

Pursuant thereto a segregation survey of the Kirk placer claim was made and, under date of March 24, 1910, the commissioner of the general land office made an order cancelling the Kirk placer claim to the extent of its conflict with the Bostrom homestead entry. On May 25, 1911, patent was issued to Bostrom. The case was tried before the court without a jury and resulted in findings, conclusions and judgment favorable to plaintiff. From the judgment and order denying a new trial, defendants have appealed.

It is claimed that, at the time of the homestead entry, the land in question was segregated from the public domain by reason of the location of the location and entry of the Kirk placer claim; that one of the placer claimants, Elisha S. Kirk, never had notice of the proceedings by which the placer claim was cancelled and the patent authorized; and that the plaintiff is not a purchaser in good faith, he having been a witness in the proceedings before the local land office and having had knowledge that defendants claimed the nineteen acre tract and that Bostrom never had been in possession thereof. Whatever may be the merits of these contentions, if made before the patent to the homestead had been issued or if made in a direct attack upon the patent, it is clear to us that they cannot be success-
167 fully maintained in this action because of the issuance of the patent for the homestead. The principles involved were so carefully investigated and the authorities considered in King v. McAndrews, 50 C. C. A. 29,—111 Fed. 860, that we adopt the following language of the opinion in that case as the reasons for our conclusions, viz:

"The land department of the United States, including in that term

the secretary of the interior, the commissioner of the general land office, and their subordinate officers, constitutes a special tribunal, vested with judicial power to hear and determine the claims of all parties to the public lands which it is authorized to dispose of, and with power to execute its judgments by conveyances to the parties entitled to them. 9 Stat. 395, c. 108, §3 (Rev. St. §441); 5 Stat. c. 352, §1 (Rev. St. §453).

"A patent of land within its jurisdiction, issued by the land department, is the judgment of that tribunal, and a conveyance of the legal title to the land to the patentee in execution of the judgment.

"When such a patent to land within the jurisdiction of the department is issued, it is, like the judgments of other judicial tribunals, impervious to collateral attack.

"The test of the jurisdiction of this tribunal is the true answer to the question, had the department the power to hear and determine the claims of the applicants of the land and to dispose of it in accordance with its decision? If that question can be answered in the affirmative, the land department had jurisdiction of the case and the patent which evidences its decision conveys the legal title, and is impervious to collateral attack. If it must be answered in the negative, then its conveyance is void, and is as vulnerable in a collateral action at law as in a direct proceeding in equity to avoid it.

"Land the title to which has passed from the United States before the claim on which the patent is based was initiated, land reserved from sale and disposition for military or other like purposes, land reserved by a claim under a Mexican or Spanish grant sub judice, and land for the disposition of which congress has made no provision, is not intrusted to the disposition of the land department, is not within its jurisdiction, and hence its patents for such land are void on their face, and may be collaterally attacked in an action at law." (citing cases.)

168 "But land which the department is vested with the power and charged with the duty to hear and decide the claims of applicants for, and to dispose of in accordance with its decision, is within its jurisdiction, and its patent of such land conveys the legal title to it, and is impervious to collateral attack, whether its decision is right or wrong." (citing cases) "In the case last cited" (Barden v. Railroad Co., 154 U. S. 288, 327) "the supreme court said: 'It is the established doctrine, expressed in numerous decisions of this court, that wherever congress has provided for the disposition of any portion of the public lands, of a particular character, and authorizes the officers of the land department to issue a patent for such land upon ascertainment of certain facts, that department has jurisdiction to inquire into and determine as to the existence of such facts, and, in the absence of fraud, imposition, or mistake, its determination is conclusive against collateral attack.'

"The test of jurisdiction is not right decision, but the right to enter upon the inquiry and to make some decision. Foltz v. Railroad Co., 60 Fed. 316, 318, 8 C. C. A. 635, 637, 19 U. S. App. 576, 581; U. S. v. Winona & St. P. R. Co., 67 Fed. 959, 15 C. C. A. 107, 32, U. S. App. 289. Hence a patent evidencing an erroneous

decision of a question of law or a mistaken determination of an issue of fact, which the department was vested with the power, and charged with the duty, to decide, is as impervious to collateral attack as one which is the result of correct conclusions.

"The remedy for an error of law in the action of the department regarding the title to land intrusted to its disposition is by a direct proceeding by a bill in equity to correct it." (citing cases)

"The aggrieved party has a like remedy for the wrongful issue of a patent upon a misapprehension of the facts, which is induced by fraud or gross mistake." (citing cases)

"These established principles have been restated and these authorities have been again cited because they control the disposition of the case in hand, and because counsel for the defendants seem to be impressed with the view that every decision by the land department of the many grave and complicated issues which condition the rightful issue of a patent is a mere ministerial act, open to collateral attack for every error of law into which the officers of that department may fall, in every action at law in which the title under the patent is involved, 104 Fed. 432. Such is not the law. The decisions of that department are judicial acts. The patents it issues are judgments of a quasi judicial tribunal. In cases within its jurisdiction they are presumptively right, and as impervious to collateral attacks for errors of law or for mistakes of fact as the judgments of the courts, and all cases are within the jurisdiction of this department in which congress has intrusted to it the determination of the rights of the claimants, and the disposition of the land in accordance with its decision.

169 "The real question in this case, therefore, is, was the determination of the rights of the claimants to the land here in controversy, and the issue of a patent to it in consonance with that decision intrusted to this department? The contention of the counsel for the defendants is that it was not, because the land was within the limits of an incorporated city when it was first entered as a homestead by the patentee."

In the present case, the title to the nineteen acre tract had not passed from the United States. The land department was clearly intrusted with the decision of the relative rights of the parties and its decision may not be inquired into in this action.

The judgment and order denying a new trial are affirmed.

WHITING, J.

I concur in result.

170 IN THE SUPREME COURT,
State of South Dakota, ss:

Be it remembered, That at a term of the Supreme Court of the State of South Dakota, begun and held at Pierre, State of South Dakota, on the first Tuesday of April, A. D. 1915, on the 31st day of the term, to-wit: on the 24th day of July A. D. 1915.

Present: J. H. McCoy, Presiding Judge; Chas. S. Whiting, Ellison

G. Smith, John Howard Gates, and Samuel C. Polley, Judges of said court. The following proceedings were had and the following judgment was entered, towit:

File No. 3670.

IN THE SUPREME COURT,
State of South Dakota, ss:

April Term, A. D. 1915.

Present: J. H. McCoy, Presiding Judge, Chas. S. Whiting, Ellison G. Smith, John Howard Gates, and Samuel C. Polley, Judges of said Court, and the officers thereof.

HANS OLSON, Plaintiff and Respondent,
vs.
FRANK L. KIRK, ELISHA S. KIRK, and ELMA E. KIRK, Defendants and Appellants.

This action coming on to be heard at the October A. D. 1914 Term of this Court at the Supreme Court Room, in the City of Pierre, State of South Dakota, upon the merits of the case and without oral argument, and the Court having advised thereon and filed its decision in writing.

It is considered, ordered and adjudged, that the judgment and order of the Circuit Court, within and for Custer County, appealed from herein, be and the same are hereby affirmed.

And it is further ordered, That this action be and it is hereby remanded to said Circuit Court for further proceedings according to law and the decision of this Court.

171–178 And it is further ordered and adjudged, That respondent have and recover of the appellants costs and disbursements on this appeal, expended, taxed and allowed at Seventy-four and 50-100 Dollars.

Whiting, J., concurs specially.

By the Court.
[SEAL.]

J. H. McCOY,
Presiding Judge.

Attest:
E. F. SWARTZ, *Clerk.*
By S. G. DELAND, *Deputy Clerk.*

STATE OF SOUTH DAKOTA,
County of Hughes, ss:

I, E. F. Swartz, Clerk of the Supreme Court, within and for the State of South Dakota, do hereby certify that the above and foregoing is a full, true, correct and complete transcript and copy of the judgment of the Supreme Court of the State of South Dakota,

in the above entitled action, wherein Hans Olson is Plaintiff and Respondent, versus Frank L. Kirk, et al., Defendants and Appellants, as the same now remains of record in said Court.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, this 12th day of October, A. D. 1915.

[SEAL.] E. F. SWARTZ, *Clerk.*

Costs and disbursements taxed and allowed as follows:

Before Argument	$5.00
For Argument	15.00
Printing Brief	54.50
Total	$74.50

(Endorsed:) File No. 3670, In Supreme Court State of South Dakota, April Term, 1915. Hans Olson, Plaintiff and Respondent, vs. Frank L. Kirk, et al., Defendants and Appellants. Filed in open court this 13th day of October, 1915. Wilber I. Todd, Clerk. Remittitur.

* * * * * * *

179–194 And I hereby certify that thereafter, and on the 11th day of October, 1915, said cause was called in open Court on the petition of the defendants and appellants aforesaid for a rehearing of said appeal, and that said petition was by the Court denied in open Court; and that the same is now of record in this Court, and that no written order denying the petition was handed down; and that a record of said proceeding is found on page 94 of Daily Journal of the Supreme Court of the State of South Dakota.

And thereafter, to-wit, on the 18th day of October, A. D. 1915, a petition for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of South Dakota was filed, which in words and figures is as follows, to-wit:

* * * * * * *

195 And on the same day assignments of error was filed by the said defendants and appellants, together with said petition, which assignments of error is in words and figures as follows, to-wit:

Original.

196 In the Supreme Court of the State of South Dakota.

HANS OLSON, Plaintiff and Respondent.
vs.
FRANK L. KIRK, ELISHA S. KIRK, and ELMA E. KIRK, Defendants and Appellants.

Assignment of Errors.

Now come the defendants and appellants, Frank L. Kirk, Elisha S. Kirk, and Elma E. Kirk, by their attorneys, and in connection

with their petition for a writ of error, make the following assign ment of errors which the defendants aver occurred upon the tria of said cause, and say that in the record, proceedings, decision an judgment and decree of the Supreme Court of the State of Sout Dakota in the above entitled action and matter, there is manifes error, in this, to-wit:

I.

That the Supreme Court of the State of South Dakota erred i sustaining the validity of plaintiff's patent as to the area include within the Kirk Placer Claim, duly located by the defendants, entr whereof had been made, and final Receiver's Receipt wherefor ha been issued to the defendants under the provisions of Chapter V Title 32, of the Revised Statutes of the United States, prior to th settlement or homestead entry of plaintiff's grantor.

II.

That the Supreme Court of the State of South Dakota erred i failing to determine that by the location of the Kirk Placer Clai the area in conflict between the Kirk Placer Claim and the Bostro homestead had been segregated from the public domain; and i failing to determine that by the entry of said Kirk Placer Clai and the issuance of the Receiver's Receipt the validity thereof ha been conclusively determined between the parties hereto, and by th decision of the Honorable Commissioner of the General Lan Office, of December 10th, 1903, and of the Honorable Secretary the Interior, of June 30th, 1904, its validity conclusivel
197 determined as to the United States; and that the area in co flict was not thereafter subject to disposal by the Depar ment of the Interior.

III.

The Supreme Court of the State of South Dakota erred in fai ing to determine that the Department of the Interior, by issuan of its Receiver's Receipt and acceptance of the acreage money r quired by law to be paid therefor, disposed of the area in conflic between the homestead entry of plaintiff's grantor and the Kir Placer Claim, and that thereafter the defendants were the owne thereof, and the United States held title in trust thereafter for th defendants, and could and did, therefore, convey no title in viol tion of such trust.

IV.

The Supreme Court of the State of South Dakota erred in fai ing to determine that at the time of the homestead entry, fin proof and issuance of patent under the homestead entry of th plaintiff's grantor, the United States held title to the area in co flict between the homestead entry and the Kirk placer in trust f the defendants, and that under such patent, so issued, the plaintiff

grantor held the title to such area in trust for the defendants, and the plaintiff, having acquired title with full knowledge of defendant's possession, claim and right to the property, held title to such conflicting area in trust, and should be required to convey the title to such area to the defendants.

V.

The Supreme Court of the State of South Dakota erred in disregarding the rights of the defendants acquired under the provisions of Chapter VI, Title 32, of the Revised Statutes of the United States, and guaranteed to them under the Receiver's Receipt, whereby the defendants became the equitable owners of the property in controversy and the United States held the legal title thereto in trust for the owners of the Kirk Placer Claim.

Wherefore, The said defendants and appellants, Frank L. Kirk, Elisha S. Kirk and Elma E. Kirk, pray that said judgment and decree, and the decision of the Supreme Court of the State of
198 South Dakota may be reversed, set aside and annulled, and that the same may be modified, and that the defendants and respondents may be restored to all things which they have lost by the action and because of said decision and judgment and decree, including the title and possession of said premises.

Dated at Aberdeen, South Dakota, this 14th day of October, A. D. 1915.

WILLIAM G. PORTER,
ED. L. GRANTHAM, AND
C. C. CROAL,
Attorneys for Frank L. Kirk, Elisha S. Kirk, and Elma E. Kirk, Defendants and Appellants.

199 [Endorsed:] Original. 3670. In the Supreme Court of the State of South Dakota, October Term, 1915. Hans Olson, plaintiff and respondent, vs. Frank L. Kirk, Elisha S. Kirk and Elma E. Kirk, defendants and appellants. Assignment of errors on writ of error from the Supreme Court of the United States. Supreme Court, State of South Dakota. Filed Oct. 18, 1915. E. F. Swartz, Clerk. William G. Porter, Ed. L. Grantham, C. C. Croal, attorneys for plaintiffs in error, Aberdeen, S. Dak.

200–206 And afterwards, to-wit, on the same day, bond on writ of error was filed by the said defendants and appellants, which in words and figures is as follows, to-wit:

* * * * * * *

207 And afterwards, to-wit, on the 30th day of November, A. D. 1915, writ of error from the Supreme Court of the United States to the Supreme Court of the State of South Dakota was filed, which original writ of error is hereto attached and herewith returned to the Supreme Court of the United States.

* * * * * * *

Original.

208 In the Supreme Court of the State of South Dakota.

HANS OLSON, Plaintiff and Respondent,
vs.
FRANK L. KIRK, ELISHA S. KIRK, and ELMA E. KIRK, Defendants and Appellants.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of South Dakota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of the State of South Dakota, before you, or some of you, being the highest Court of law or equity of the said state in which a decisio- could be had in the said suit between Hans Olson, plaintiff and respondent, and Frank L. Kirk, Elisha S. Kirk, and Elma E. Kirk, defendants and appellants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of their validity; and wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege or exemption especially set up or claimed under such clause of the Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said defendant and appellant, as by its complaint appears; we being willing that error, if any hath been, should be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have
209 the same in the said Supreme Court at Washington, within sixty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of

he Supreme Court of the United States, this 9th day of November, n the Year of Our Lord, One Thousand Nine Hundred and Fifteen.

[U. S. Dist. Court Seal, Dist. of South Dakota.]

OLIVER S. PENDAR,
Clerk of the District Court of the United States for the District of South Dakota.

Allowed by:
J. H. McCOY,
Presiding Judge of the Supreme Court of the State of South Dakota.

Attest:

[Seal Supreme Court, State of South Dakota.]

E. F. SWARTZ, *Clerk.*

10–217 Original. 3670. In the Supreme Court of the State of South Dakota. Hans Olson, Plaintiff and Respondent, s. Frank L. Kirk et al., Defendants and Appellants. Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of South Dakota. Supreme Court, State of South Dakota. Filed Nov. 30, 1915. E. F. Swartz, Clerk. William G. Porter, Ed. L. Grantham, C. C. Croal, Attorneys for Plaintiffs in Error, Aberdeen, S. Dak.

Due and personal service of the within and foregoing Writ of Error is hereby acknowledged by delivery to us of a true and correct copy of the same at Hot Springs, S. D. this 8 day of December, 1915.

WILSON & WILSON,
Att'y for Hans Olson.

18 In the Supreme Court of the United States, October, 1915, Term.

No. 798.

FRANK L. KIRK, ELISHA S. KIRK, and ELMA E. KIRK, Plaintiffs in Error,
vs.
HANS OLSON, Defendant in Error.

Statement of the Plaintiffs in Error of the Parts of the Record Which They Think Necessary for the Consideration of the Errors on Which They Intend to Rely.

And now come the plaintiffs in error, Frank L. Kirk, Elisha S. Kirk and Elma E. Kirk, above named, and serve and file this statement of the parts of the record which they think necessary for the consideration of the errors on which they intend to rely, and direct the Clerk of the above named Court to cause only said parts of the record to be printed, to-wit:

That part of the record included as follows: Commencing with the title "Complaint," on the first page of the printed Appellant's Brief and Abstract included within said record, and including all of the matter set forth in said Brief and Abstract on pages numbered one (1) to sixty (60) inclusive, as far as the title "Notice of Intention," on said page sixty (60);

That part of the record included as follows: Commencing with the title "Appeal" on page numbered 63 of the printed Appellant's Brief and Abstract included within said record, and including all of the matter set forth in said Brief and Abstract on pages numbered 63 to 78, inclusive, as far as the title "Brief and Argument," on said page 78;

That part of the record included as follows: Commencing immediately following the "Respondent's Brief," with the words:

219 "And afterwards, to-wit, on the 19th day of February, 1915," and including all of the following portions of said record, including the opinion and remittitur and judgment of the Supreme Court of the State of South Dakota, down to and including the close of said remittitur and judgment; and down to, but not including, the words, "And thereafter and on the 10th day of August, 1915;"

That part of record reading as follows:

"And I hereby certify that thereafter and on the 11th day of October, 1915, said cause was called in open court on the petition of the defendants and appellants aforesaid for a rehearing of said appeal, and that said petition was by the Court denied in open Court; and that the same is now of record in this Court, and that no written order denying the petition was handed down; and that a record of said proceeding is found on page 94 of Daily Journal of the Supreme Court of the State of South Dakota."

That part of the record reading as follows:

"And thereafter, to-wit on the 18th day of October, A. D. 1915, a petition for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of South Dakota, was filed."

That part of the record commencing with the words, "And on the same day assignments of error was filed," and including all the following portion of said record down to and including the close of said Assignuments of Error so filed, and down to and including the words: "And afterwards, to-wit, on the same day, bond on writ of error was filed."

That part of the record reading as follows:

"And afterwards, to-wit on the 30th day of November, A. D. 1915, writ of error from the Supreme Court of the United States to the Supreme Court of the State of South Dakota was filed, which original writ of error is hereto attached and herewith returned to the Supreme Court of the United States."

That part of the record including the writ of error, together with the endorsements thereon showing service thereof upon the defendants in error;

220 And hereto annexed, and served and filed therewith, the plaintiffs in error set forth a statement of the errors upon

hich they intent to rely in the Supreme Court of the United States; d direct that such statement be likewise included and printed in e printed record.

Dated at Aberdeen, South Dakota, April 1st, 1916.

WILLIAM G. PORTER,
ED. L. GRANTHAM,
C. C. CROAL,
Attorneys for Plaintiffs in Error, Aberdeen, South Dakota.

1 In the Supreme Court of the United States, October, 1915, Term.

No. 798.

ANK L. KIRK, ELISHA S. KIRK, and ELMA E. KIRK, Plaintiffs in Error,
vs.
HANS OLSON, Defendant in Error.

atement by Plaintiffs in Error of the Errors on Which They Intend to Rely in the Supreme Court of the United States.

And now come the plaintiffs in error, Frank L. Kirk, Elisha S. irk, and Elma E. Kirk, above named, and serve and file the folwing statement of the errors upon which they intend to rely in the upreme Court of the United States, and which said plaintiffs in ror aver occurred upon the trial of said cause, and say, that in the cord, proceedings, decision and judgment of the Supreme Court the State of South Dakota, in the above entitled action and mat-r, there is manifest error in this, to-wit:

I.

That the Supreme Court of the State of South Dakota erred in susining the validity of defendant in error's patent as to the area cluded within the Kirk Placer Claim, duly located by the plainffs in error, entry whereof had been made, and final Receiver's Reipt wherefor had been issued to the plaintiffs in error under the rovisions of Chapter VI, Title 32, of the Revised Statutes of the nited States, prior to the settlement or homestead entry of the rantor of the defendant in error.

II.

That the Supreme Court of the State of South Dakota erred in iling to determine that by the location of the Kirk Placer Claim ne area in conflict between the Kirk Placer Claim and the Bostrom omestead had been segregated from the public domain; and in failing to determine that by the entry of said Kirk Placer
22 Claim, and the issuance of the Receiver's Receipt the validity thereof had been conclusively determined between the parties

hereto, and by the decision of the Honorable Commissioner of the General Land Office, of December 10th, 1903, and of the Honorable Secretary of the Interior of June 30th, 1904, its validity conclusively determined as to the United States; and that the area in conflict was not thereafter subject to disposal by the Department of the Interior.

III.

That the Supreme Court of the State of South Dakota erred in failing to determine that the Department of the Interior, by issuance of its Receiver's Receipt and acceptance of the acreage money required by law to be paid therefor, disposed of the area in conflict between the homestead entry of the grantor of the defendant in error and the Kirk Placer Claim, and that thereafter the plaintiffs in error were the owners thereof, and the United States held title in trust thereafter for the plaintiffs in error, and could and did, therefore, convey no title in violation of such trust.

IV.

That the Supreme Court of the State of South Dakota erred in failing to determine that at the time of the homestead entry, final proof, and issuance of patent under the homestead entry of the grantor of the defendant in error, the United States held title to the area in conflict between the homestead entry and the Kirk Placer in trust for the plaintiffs in error, and that under such patent so issued, the grantor of the defendant in error held the title to such area in trust for the plaintiffs in error; and the defendant in error, having acquired title with full knowledge of the possession of plaintiffs in error, and of the claim and right of the plaintiffs in error, held title to such conflicting area in trust, and should be required to convey the title to such area to the plaintiffs in error.

V.

That the Supreme Court of the State of South Dakota erred in disregarding the rights of the plaintiffs in error, acquired under the provisions of Chapter VI, Title 32, of the Revised Statutes of the United States, and guaranteed to them under the Receivers' Receipt, whereby the plaintiffs in error became the equitable owners of the property in controversy and the United States held the legal title thereto in trust for the owners of the Kirk Placer Claim.

223

Wherefore, The said plaintiffs in error, Frank L. Kirk, Elisha S. Kirk, and Elma E. Kirk, pray that said judgment and decree and the decision of the Supreme Court of the State of South Dakota, may be reversed, set aside and annulled, and that the same may be modified, and that the plaintiffs in error in the Supreme Court of the United States may be restored to all things which they have lost by the action and because of said decision and judgment and decree, including the title and possession of said premises.

And the said plaintiffs in error attach hereto and serve and file herewith a statement of the parts of the record herein which they think necessary for the consideration of the errors on which they intend to rely, hereinbefore set out.

Aberdeen, South Dakota, April 1st, 1916.

WILLIAM G. PORTER,
ED. L. GRANTHAM,
C. C. CROAL,
Attorneys for Plaintiffs in Error, Aberdeen, South Dakota.

224 [Endorsed:] 798/25081. #798, October Term, 1915. In the Supreme Court of the United States. Frank L. Kirk, et al., Plaintiffs in Error, vs. Hans Olson, Defendant in Error. Statement of errors upon which the plaintiffs in error will rely; and statement of the parts of the record which they think necessary for the consideration of such errors. Due, legal and personal service of the within and foregoing statements is hereby acknowledged by delivery to us of a true and correct copy of the same at Hot Springs, S. D. this 4th day of April, 1916. Wilson & Wilson, Att'ys for Defendant in Error. William G. Porter, Ed. L. Grantham, C. C. Croal, Attorneys for P't'f. in Error, Aberdeen, S. Dak.

225 [Endorsed:] File No. 25,081. Supreme Court U. S., October term, 1915. Term No. 798. Frank L. Kirk et al., Pl'ffs in Error, vs. Hans Olson. Statement of errors to be relied upon and designation by plaintiffs in error of parts of record to be printed, and proof of service of same. Filed April 8, 1916.

226 UNITED STATES OF AMERICA,
District of South Dakota, County of Brown, ss:

I, Walter J. Madden, being duly sworn, depose and say: that I am a natural born citizen of the United States; am over the age of twenty one years and am a resident elector of Brown County, South Dakota in said district; that at Aberdeen, Brown County, in said district on the 26th day of June, 1916, I served the annexed paper upon William G. Porter, one of the attorneys for plaintiff in error, by then and there handing to and leaving with said William G. Porter a true copy thereof.

WALTER J. MADDEN.

Subscribed and sworn to before me this 26th day of June, 1916.

[Seal G. N. Williamson, Notary Public, State of South Dakota.]

G. N. WILLIAMSON,
Notary Public, S. D.

227 In the Supreme Court of the United States, October, 1915 Term.

No. 798.

FRANK L. KIRK, ELISHA S. KIRK, and ELMA E. KIRK, Plaintiff in Error,
vs.
HANS OLSON, Defendant in Error.

Statement of Defendant in Error of Additional Parts of the Record Which He Thinks Material.

Comes now the defendant in error, Hans Olson, above named, and serves and files this statement designating in writing additional parts of the record in the above entitled case which he thinks material to a hearing therein, and directs the Clerk of the said Court to cause such additional parts of the record to be printed, to-wit:

That part of the record included as follows: commencing with the title "Completion of Record" on the first page of the printed Respondent's Brief included within said record and including all of the matter set forth in said Respondent's Brief on pages numbered one (1) to thirteen (13) both inclusive, as far as the title "Brief and Argument" on said page thirteen (13).

Dated at Hot Springs, South Dakota, this 24th day of June, 1916.

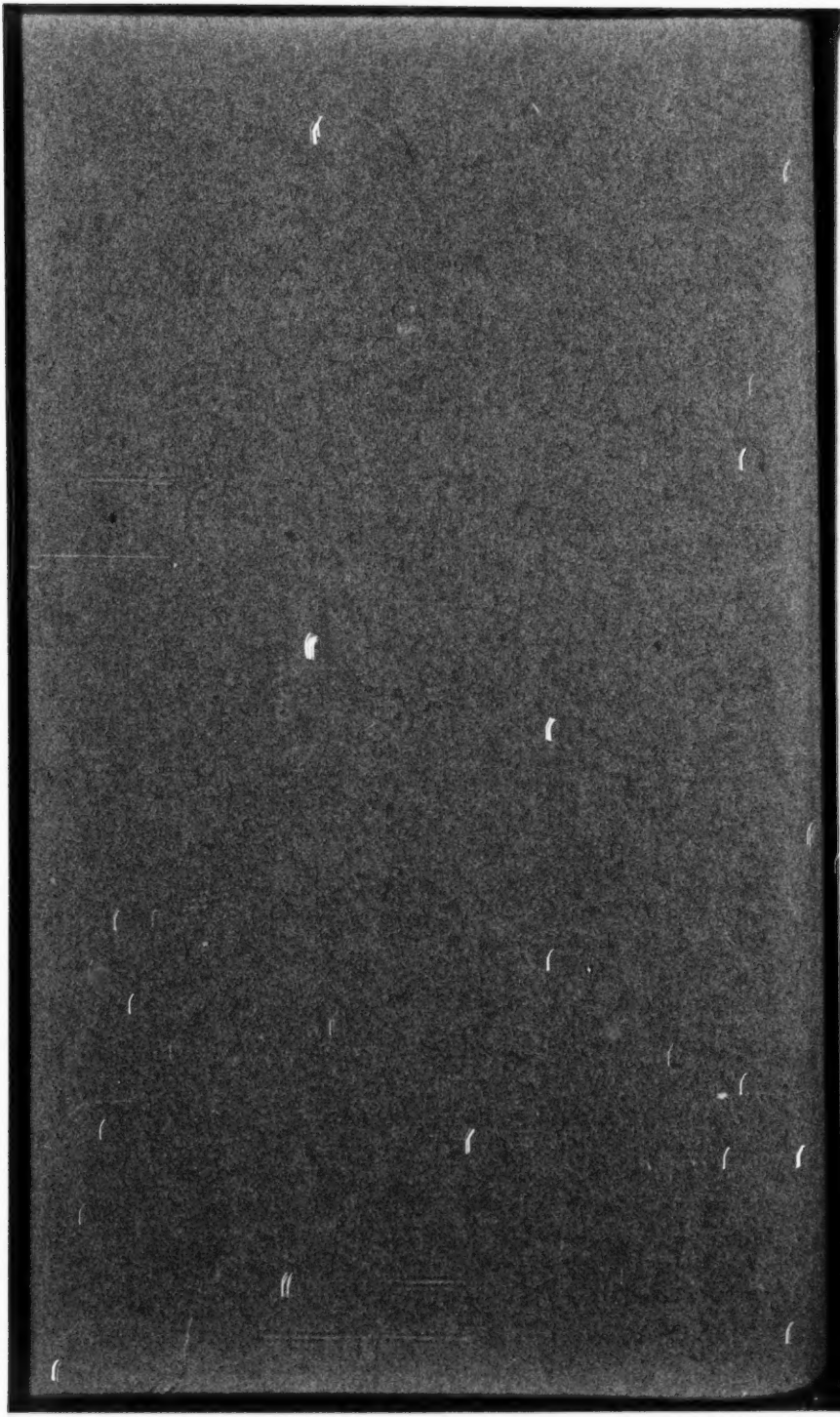
CLIFFORD A. WILSON,
Attorney for Defendant in Error,
Hot Springs, South Dakota.

228 [Endorsed:] 343/25081. In the Supreme Court of the United States, October, 1915, Term. Frank L. Kirk, Elisha S. Kirk, and Elma E. Kirk, Plaintiffs in Error, vs. Hans Olson Defendant in Error. Statement of Defendant in Error of Additional Parts of the Record Which He Thinks Material. Due, legal and personal service of the within Statement of Defendant in Error of Additional Parts of the Record which he thinks Material, is hereby accepted by copy and receipt of copy acknowledged at Aberdeen, South Dakota, this — day of ——, A. D. 1916. —— —— Attorneys for Plaintiffs in Error. Clifford A. Wilson, Attorney for Defendant in Error.

229 [Endorsed:] File No. 25081. Supreme Court U. S., October Term, 1916. Term No. 343. Frank L. Kirk et al Pl'ffs in Error, vs. Hans Olson. Designation by defendant in error of parts of record to be printed. Filed July 1, 1916.

Endorsed on cover: File No. 25,081. South Dakota Supreme Court. Term No. 343. Frank L. Kirk, Elisha S. Kirk, and Elma E. Kirk, plaintiffs in error, vs. Hans Olson. Filed January 10th 1916. File No. 25,081.

[redacted]



IN THE

Supreme Court of the United States

OCTOBER TERM, 1916

NO. 343

FRANK L. KIRK, ELISHA S. KIRK AND ELMA E. KIRK, PLAINTIFFS IN ERROR

vs.

HANS OLSON

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

SUBJECT INDEX

	Page
Questions Presented for Determination	1–2
Statement of the Case	3–6
Title to Kirk Placer	3–3
Title to Homestead Entry	3–5
Orders Affecting Homestead Entry	3–4
Notice to Defendant in Error	5
Elisha S. Kirk Not a Party and Had No Notice	5
Court Proceedings	5–6
Specifications of Error	7–8
Brief of Argument	9–15
Placer Entry Segregated Area from Public Domain	9
Attempted Cancellation Void	9–11
Patent as to Conflict Void	12
Subsequent Cancellation Does Not Validate Homestead Entry	12
Patent Not Conclusive	13–13
Defendant in Error Not an Innocent Purchaser	13
Homestead Entry Fraudulent and Void as to Conflict	13–15
List of Cases Cited	16

IN THE

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NO. 343

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vs.

HANS OLSON

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

BRIEF FOR PLAINTIFFS IN ERROR

MAY IT PLEASE THE COURT:

The principal question here presented for decision is:

Does a homestead patent to lands located in a forest reserve, entered under the Act of March 3, 1889, (30 Stat., 1074-5), and the Act of April 15, 1902, (32 Stat., 106), convey title, and entitle the patentee or his grantee with notice, to the possession of a portion of a prior placer mining location taken under the provisions of Chapter VI, Title 32, of the Revised Statutes of the United States, for which placer claim entry had been made and final receipt issued prior to the homestead entry, and the validity of which mining claim and the regularity of the entry whereof had been declared by the Land Department in a proceeding instituted by the Department?

And incidentally the questions:

First: Had the Land Department authority to cancel that portion of the Kirk placer in conflict with the subsequent

homestead entry, in a proceeding to which Elisha S. Kirk, co-owner in the Kirk placer, was not a party, and of which proceeding he had no notice?

Second: Had the Department authority; in the same proceeding, on an order directed to the homestead claimant to show cause why the homestead entry be not cancelled to the extent of the conflict with the Kirk placer on account of the priority of the placer entry; to cancel that portion of the placer claim in conflict with the homestead entry, upon a showing that such portion was agricultural, and not mineral, in character?

Third: Did not the Land Department intentionally and effectually refer the contending claimants to the courts to have there determined the rightful ownership of the property in controversy, by finding that the homestead entry had been wrongfully allowed, but that the area in conflict was agricultural in character rather than mineral, and ordering cancellation of the placer entry to the extent of the conflict, and ordering patent to issue to the homestead entryman, so far as the government was concerned, provided no intervening rights have attached?

Fourth: Does a homestead patent issued in pursuance of the Act of March 3, 1889, (30 Stat., 1074-5), and the Act of April 15, 1902, (32 Stat., 106), requiring actual possession of the lands by the entryman prior to entry or final proof, convey title to lands which were at all times in possession of others under a valid and subsisting placer mining claim taken in accordance with the United States mining laws, and which lands had been entered for patent, and for which final receipt had issued, prior to the homestead entry?

STATEMENT OF THE CASE

The Kirk placer mining claim was located June 9, 1894. (Record, 12.) An amended location thereof, by Frank L. Kirk and Elisha S. Kirk and co-locators, was made October 2, 1899, and the certificate of relocation filed October 10, 1899, with the register of deeds of Custer county, South Dakota. (Record, 12-13.) Mineral entry thereof, (Mineral application No. 1369), was made November 18, 1901, in the United States land office at Rapid City, South Dakota. (Record, 13.) On February 15, 1902, final entry was made, and receiver's receipt covering Mineral Entry No. 1267, for lot 1381, embracing 157.929 acres, purchased for $395.00, was issued to Frank L. Kirk and Elisha S. Kirk, plaintiffs in error herein. (Record, 13-14.)

The Honorable Commissioner of the General Land Office on July 18, 1903, issued an order, based upon an adverse report by the Forest Service, directing a cancellation of the placer entry for failure to conform to the legal subdivisions, and on the further grounds that the land is agricultural and not mineral, and that the improvements were insufficient. (Record, 14-15.) On December 10, 1903, upon the showing made, the lands were found to be mineral in character, and the improvements thereon sufficient, but the claimants were required to cause the location to conform to the legal subdivisions. (Record, 15-17.) And on June 30, 1904, a departmental order was made, reversing the ruling of the Honorable Commissioner with reference to conforming the placer to the legal subdivisions, and exempting the placer entry from such requirement. Notice of the order was given claimants on July 15, 1904, and the validity of the Kirk placer claim and the right of the claimants to patent thereto finally adjudicated. (Record, 17-18.)

John Bostrom made final homestead entry No. 6970, on July 12, 1902, covering a tract of 155 acres, a portion of which, amounting to 19.439 acres, conflicted with the Kirk placer mine and entry. The homestead entry was made under the provisions of the Act of March 3, 1889, (30 Stat., 1074-5), and the Act of April 15, 1902, (32 Stat., 106). October 20, 1902, Bostrom made commuted homestead cash entry No. 2794 for the 155-acre tract. (Record, 9, 21.)

On October 22, 1902, William A. Nevin and Frank L. Kirk filed a protest against the homestead entry, alleging conflict

with the Kirk placer mine and with the Monatomic lode claim; upon a holding of insufficiency, a further protest was filed by the same protestants on March 21, 1904. On Sptember 8, 1904, the Honorable Commissioner of the General Land Office, acting upon the protest, issued an order, reciting that the proofs relating to the Kirk placer had been found regular, and the mineral application and entry thereof being prior in point of time, the homestead entryman was given sixty days to show cause why his entry should not be cancelled to the extent of the conflict with the Kirk placer. The order also directed a hearing to be had, to determine the character of the land involved in the conflict between the Monatomic lode claim and the Bostrom homestead entry. (Record, 19-20.)

On October 18, 1906, the Honorable Commissioner of the General Land Office, reviewing the decision of the local land office, modified the order cancelling that part of the homestead in conflict with the Monatomic lode claim, and affirmed that part of the decision which found the land in conflict between the Kirk placer and the Bostrom homestead to be more valuable for agricultural than for mineral purposes, and held the mineral entry of the Kirk placer for cancellation to the extent of the conflict. (Record, 21-24.)

The Commissioner's decision was brought before the Secretary of the Interior for review, and on June 7, 1907, the Secretary issued his order, wherein he recited the order to show cause as to the conflict between the Kirk placer and the homestead entry, the hearing as to the character of the land in conflict between the Monatomic lode claim and the homestead entry, and stated that Bostrom had submitted his testimony on the order to show cause on the conflict with the Kirk placer at the same time with the hearing on the Monatomic lode claim conflict; he recited the decision of the Honorable Commissioner, finding that the lands in conflict with the Kirk placer were agricultural and not mineral in character, and the Secretary found and ordered as follows:

> "The homestead entry was wrongfully allowed as to the conflict with the prior placer entry, but inasmuch as it has been shown that the land in the forty-acre subdivsion in which the conflict exists is not mineral in character, the placer entry will be cancelled to the extent of the conflict, and the homestead entry may be permited to stand with respect thereto, so far as the government is concerned, provided no intervening rights have attached." (Record, 10-11.)

On May 25, 1911, patent was issued to the homestead claimant, John Bostrom, for the lands covered by his entry, including the area in conflict with the Kirk placer. Bostrom conveyed the lands described in the patent to Hans Olson, defendant in error, by warranty deed dated February 3, 1912. (Record, 5.)

On February 13, 1911, plaintiffs in error were served with a notice of protest against the entry of the Kirk placer, embracing 157.929 acres, which notice recognized the existence of the entry as of that date for the full area, including the area in conflict with the Bostrom homestead entry. (Record, 24-25.)

The area in conflict has been enclosed by a fence, and at all times in the exclusive possession of Frank L. Kirk and Elisha S. Kirk, since the year 1897. (Record, 5-6.) Defendant in error, grantee of the homestead claimant and patentee, had full knowledge and notice of the claim and possession of the placer claimants. He had been a witness for the homestead entryman, and knew of the conflict. (Record, 5.)

Elisha S. Kirk, one of the co-owners of the Kirk placer, was not a party to the protest against the Bostrom homestead entry, and had no notice whatever of the proceedings wherein the order for the cancellation of the Kirk placer to the extent of the conflict with the Bostrom homestead was made. (Record, 7, 9, 19.)

The present action was instituted in the Circuit Court of Custer county, South Dakota, by Hans Olson, defendant in error, against the plaintiffs in error. In his complaint Olson claimed to be the owner of the lands described in the Bostrom homestead patent, demanded possession thereof and damages for the wrongful withholding thereof, and prayed the judgment and decree of the court quieting title thereto in himself. (Record, 1.) The defendants (plaintiffs in error here) answered by general denial, and as affirmative defense and cross-complaint alleged the prior location, entry, and final entry of the Kirk placer, the conflict of the homestead therewith, the proceedings in the land office, the final determination by the Land Department of the validity of the Kirk placer claim and entry, and that the owners were entitled to patent thereto; alleged that the lands in conflict were segregated from the public domain by the location of the Kirk placer claim, and therefore not subject to homestead entry; alleged that the homestead entry for the area in conflict was fraudulent and void by reason of the prior entry, by reason of the want of

possession in the homestead entryman; alleged that the plaintiff's grantor obtained no right or interest in the lands in conflict under the patent issued therefor; alleged that the plaintiff Olson had full knowledge of the claims of the placer owners, and of the conflict and the rights of the parties; and prayed that Olson be decreed to hold title in trust for defendants (plaintiffs in error), and for general relief. (Record, 1-4.) The plaintiff replied by general denial. (Record, 4.)

The action was tried in the Circuit Court of Custer county, South Dakota, on April 25, 1913, before the court without a jury, and findings, decision and judgment and decree entered as prayed for by the plaintiff Olson. (Record, 5-27.) Upon appeal to the Supreme Court of the state of South Dakota, said decree and judgment was in all things affirmed, (Record, 40-45), and a petition for a rehearing of the appeal was denied. (Record, 45.) Thereafter plaintiffs in error filed their petition for writ of error, together with assignments of error, which writ was allowed and duly served upon counsel of record for the defendant in error, plaintiff in the action, to which writ of error the Supreme Court of the state of South Dakota and the clerk thereof, made their return to the Supreme Court of the United States (Record, 45-49), and the plaintiffs in error duly made, served and filed a statement of the errors upon which they intend to rely upon the review of said action upon said writ of error, in the Supreme Court of the United States. (Record, 51-53).

The facts above recited are presented by the evidence, preserved by bill of exceptions, and certified to this Court in response to the writ of error.

SPECIFICATIONS OF ERROR RELIED UPON

First: That the Supreme Court of the state of South Dakota erred in affirming the judgment and decree of the Circuit Court of said state sustaining the validity of defendant in error's patent as to the area included within the Kirk placer claim, duly located by the plaintiffs in error, entry whereof had been made, and final receiver's receipt wherefor had been issued to the plaintiffs in error under the provisions of Chapter VI, Title 32, of the Revised Statutes of the United States, prior to the settlement or homestead entry of the grantor of the defendant in error.

Second: That the Supreme Court of the state of South Dakota erred in affirming the judgment and decree of the Circuit Court of said state failing to determine that by the location of the Kirk placer claim the area in conflict between the Kirk placer claim and the Bostrom homestead had been segregated from the public domain; and in failing to determine that by the entry of said Kirk placer claim, and the issuance of the receiver's receipt, the validity thereof had been conclusively determined between the parties hereto, and by the decision of the Honorable Commissioner of the General Land Office on December 10, 1903, and of the Honorable Secretary of the Interior of June 30, 1904, its validity conclusively determined as to the United States; and that the area in conflict was not thereafter subject to disposal by the Department of the Interior.

Third: That the Supreme Court of the state of South Dakota erred in affirming the judgment and decree of the Circuit Court of said state failing to determine that the Department of the Interior, by issuance of its receiver's receipt and acceptance of the acreage money required by law to be paid therefor, disposed of the area in conflict between the homestead entry of the grantor of the defendant in error and the Kirk placer claim, and that thereafter the plaintiffs in error were the owners thereof, and the United States held title in trust thereafter for the plaintiffs in error, and could and did, therefore, convey no title in violation of such trust.

Fourth: That the Supreme Court of the state of South Dakota erred in affirming the judgment and decree of the Circuit Court of said state in failing to determine that at the time of the homestead entry, final proof, and issuance of patent under the homestead entry of the grantor of the defendant in error, the United States held title to the area in

conflict between the homestead entry and the Kirk placer in trust for the plaintiffs in error, and that under such patent so issued, the grantor of the defendant in error held the title to such area in trust for the plaintiffs in error; and the defendant in error, having acquired title with full knowledge of the possession of plaintiffs in error, and of the claim and right of the plaintiffs in error, held title to such conflicting area in trust, and should be required to convey the title to such area to the plaintiffs in error.

Fifth: That the Supreme Court of the State of South Dakota erred in affirming the judgment and decree of the Circuit Court of said state disregarding the rights of the plaintiffs in error, acquired under the provisions of Chapter VI, Title 32, of the Revised Statutes of the United States, and guaranteed to them under the receiver's receipt, whereby the plaintiffs in error became the equitable owners of the property in controversy and the United States held the legal title thereto in trust for the owners of the Kirk placer claim.

BRIEF OF ARGUMENT

I

Entry of Plaintiffs in Error Segregated the Lands From the Public Domain

The lands in controversy were, by the location in 1889 (Record, 12-13, Exhibit 2), by the entry for patent in 1901, (Record, 13, Exhibit 3), and payment of acreage, February 15, 1902, (Record, 13-14), and by the final entry, (Record, 14, Exhibit 4), segregated from the public domain. The locators and applicants for patent, Elisha S. Kirk and Frank L. Kirk, thereby became the owners of the Kirk placer, and the legal title thereto was held in trust for them by the government.

Swarson v. Sears, 224 U. S. 180.
Ard v. Brandon, 156 U. S. 537.
Ard v. Pratt, 156 U. S. 537.
McMichael v. Murphy, 197 U. S. 304.
Hodges v. Colcord, 193 U. S. 192.
Witherspoon v. Duncan, 71 U. S. 210.
Kansas Pacific Ry. Co. v. Dunmeyer, 113 U. S. 629.
Noyes v. Mantle, 127 U. S. 348.
Gwillim v. Donnellan, 115 U. S. 45.
Belk v. Meagher, 104 U. S. 279.
St. Louis M. & M. Co. v. Montana Min. Co., 171 U. S. 650.

II

Attempted Cancellation of a Portion of the Entry of the Kirk Placer Mine by the Interior Department was Void and Ineffectual.

a. *Validity of Kirk placer entry had been adjudicated.*

It appears from the departmental decision of February 15, 1912, (Exhibit 6, Record, 15-17), that upon a protest and hearing the mineral character of the land embraced within the Kirk placer claim was satisfactorily shown, and its character determined, the ruling being as follows:

"The showing, as to the improvements and mineral character of the land, appears to be sufficient, but that relative to the failure to locate the claim, as far as practicable in conformity with the legal subdivisions, is not sufficient."

And by a departmental decision of June 30, 1904, the Kirk placer claim was declared exempt from the operation of the requirements that the location thereof be made to conform to the legal subdivisions, (Record, 17-18, Exhibit 7), thereby confirming the validity of the Kirk placer upon the only proceeding instituted involving the legality thereof; and the plaintiffs in error were thereupon entitled to patent.

It is the contention of the plaintiffs in error that the validity of the Kirk placer had been finally adjudicated.

Howe v. Parker, (C. C. A.) 190 Fed. 738.

b. *Elisha S. Kirk, co-owner in Kirk placer mine, not a party or given notice.*

c. *Issues did not involve character of the lands in conflict.*

Subsequent to the homestead entry, a proceeding, to which Elisha S. Kirk, one of the locators and owners of the Kirk placer claim, was not a party, and of which he had no notice, (Record, 7, 9, 20-21), was had, and therein a partial cancellation of the Kirk placer was directed by departmental order dated September 8, 1904, (Record, 17-18), in the following language:

> "Inasmuch as the proof relating to said Kirk placer is found regular, the same could now be passed to patent were it not for the conflict with said homestead entry. The mineral application and entry being prior, in point of time, to the homestead entry, said homestead entryman is hereby granted sixty days from notice hereof in which to show cause, if any exists, why his entry should not be cancelled to the extent of its conflict with the Kirk placer mine, in default of which showing the entry will be cancelled, as indicated." (Record, 20.)

Only the question of priority of entry was by this order submitted for consideration.

Upon the showing made, the Honorable Commissioner of the General Land Office held that portion of the Kirk placer in conflict with the homestead entry was agricultural in character, and not mineral, and held the homestead entry intact, ordering the Kirk placer to be cancelled as to such conflict. (Record, 21-24, Exhibit 10.)

Upon a review of the proceedings upon the application of William A. Nevin and Frank L. Kirk, the Secretary of the Interior, under date of June 7, 1907, (Record, 9-11, Exhibit

B), by departmental decision, remitted the parties to the controversy to the court, as to their conflicting rights, in the following language:

> "The homestead entry was wrongfully allowed as to the conflict with the prior placer entry, but inasmuch as it has been shown that the land in the forty acre subdivision in which the conflict exists is not mineral in character, the placer entry will be cancelled to the extent of the conflict, and the homestead entry may be permitted to stand with respect thereto, so far as the government is concerned, provided no intervening rights have attached."

The issues presented, therefore, did not involve the validity of the Kirk placer claim, but only presented for consideration the validity of the homestead entry, and upon the proposition of priority of the entry.

The decision of the Land Department, to be effectual, must be confined to the questions raised.

Lee v. Johnson, 116 U. S. 48.

Elisha S. Kirk, one of the plaintiffs in error, co-owner in the Kirk placer, was not a party to the proceeding, and had no notice thereof; hence any order made therein affecting his rights was ineffectual.

Howe v. Parker, (C. C. A.) 190 Fed. 738.
Cornelius v. Kessell, 128 U. S. 456.
Parsons v. Venzke, 164 U. S. 89.

The Kirk placer, comprising 157.929 acres, having been located in conformity with the laws of the United States, entry thereof having been made in the United States Land Office by Elisha S. Kirk and Frank L. Kirk, satisfactory proof of discovery of mineral and of the mineral character of the lands determined, except as to the United States, by the final entry, and issuance of final receipt therefor, and upon a hearing it having been adjudicated that the Kirk placer was in all respects a valid and subsisting placer mining claim to the extent and area of 157.929 acres, Elisha S. Kirk and Frank L. Kirk became the owners of every part and portion thereof; and the department was without authority to cancel any part or portion of said placer entry or mining claim on account of the non-mineral character of such portion so attempted to be cancelled.

Clipper Mining Co. v. Eli Mining Co., 194 U. S. 220.
Secs. 2319, 2322, 2329, Chap. VI, Title 32, Rev. Stat.
Jones et al. v. Wild Goose Min. Co., (C. C. A.) 177 Fed. 95.

III.

Patent, as to Conflict Involved, is Void

At the time of the Bostrom homestead entry, final proof and patent, the Kirk placer remained a valid mining location, no attempt to cancel the location having been made.

Clipper Mining Co. v. Eli Min. Co., 194 U. S. 220.

A location of a mining claim is itself a grant, and entitled the locators to possession of the ground, and any entry thereon constitutes a trespass, and no right can thereby be initiated.

Clipper Mining Co. v. Eli Min. Co., 194 U. S. 220.
Dahl v. Raunheim, 132 U. S. 260.

Lands taken pursuant to the public land laws of the United States upon a compliance by the locators become private property, and are not subject to sale or disposition by the United States, and entry therefor is ineffectual and patent issued thereon void.

McMichael v. Murphy, 197 U. S. 304.
Hodges v. Colcord, 193 U. S. 192.
Witherspoon v. Duncan, 71 U. S. 210.
Noyes v. Mantle, 127 U. S. 348.
Morton v. Nebraska, 88 U. S. 660.
James v. Germania Iron Co., (C. C. A.) 107 Fed. 597.
N. P. Ry. Co. v. Townsend, 190 U. S. 267.

Recognized and stated in:

Smelting Co. v. Kemp, 104 U. S. 636.

IV

Subsequent Cancellation of Prior Entry Does Not Validate the Homestead Entry

The homestead entryman, grantor of the defendant in error, was at no time in possession of the lands in controversy, (Record, 5-6). The homestead entry of the grantor of the defendant in error was made on July 12, 1902, a portion of which conflicted with the Kirk placer claim, (Record, 19). Final proof was submitted and final entry made therefor on October 20, 1902, (Record, 9). Patent was issued therefor on May 25, 1911, (Record, 8).

Even if the cancellation of that portion of the placer entry in conflict with the Bostrom homestead were regular and valid,

the Bostrom homestead patent does not convey title. The entry was initiated by trespass, and no rights could be acquired thereunder.

Belk v. Meagher, 104 U. S. 279.
Lansdale v. Daniels, 100 U. S. 113.
N. P. Ry. v. Townsend, 190 U. S. 267.
Swanson v. Sears, 224 U. S. 180.
Rooney v. Barnette, (C. C. A.) 200 Fed. 700.

V

Patent Not Conclusive

A patent issued is not conclusive upon the rights of a prior claimant. An error in law committed by the Land Department may be corrected and the title declared in the real owner.

Lytle v. Arkansas, 63 U. S. 193.
Smelting Co. v. Kemp, 104 U. S. 636.
Moore v. Robbins, 96 U. S. 530.
Germania Iron Co. v. James, (C. C. A.) 89 Fed. 811.

VI

Defendant in Error Not an Innocent Purchaser

It is very clear that the defendant in error had notice and knowledge of the claim of the plaintiffs in error. He was a witness for Bostrom, his grantor, in the various proceedings before the Land Department, and knew of the possession of the Kirk placer claimants for many years prior to the homestead entry. (Record, 5-6.)

VII

Homestead Entry Fraudulent and Void as to Area in Conflict

We further contend that the homestead entry of the grantor of the defendant in error, as to the area in conflict, is fraudulent, and no title thereunder acquired by the homestead entryman, for the reason that the homestead entry was taken under the Act of March 3, 1889, 30 Stat. 1074-5, and the Act of April 15, 1902, 32 Stat. 106, (Record, fol. 19), enacted for the relief of settlers upon the Black Hills Forest Reserve, permitting them to make entry of lands in their possession at the time of the issuance of the proclamation creating the forest re-

serve; it being required by the acts of congress that the homestead entryman maintain continuous residence thereon for the requisite period. The act also provides for metes and bounds surveys of lands in the possession of an entryman, for the express purpose of protecting adjoining claimants against intrusion, resulting from filing upon forty-acre subdivisions.

It being undisputed that the grantor of the defendant in error was at no time in possession of the lands in controversy under the law he was not entitled to homestead entry therefor, and any affidavit or showing made by him or on his behalf, as to possession, occupation, or residence upon the lands in controversy, was false and fraudulent.

The Department of the Interior erred in passing the Bostrom homstead to patent for the area in conflict, for that Bostrom was never in possession of the lands in conflict and under the law, was not entitled to enter the same under the act of congress providing for the homesteading of lands within the Black Hills Forest Reserve. His entry thereon was a trespass, and the entry void.

Lyle v. Patterson, (C. C. A.) 176 Fed. 909.
Atherton v. Fowler, 96 U. S. 513.

In conclusion, reviewing the action of the Land Department, we find the final order made by the Honorable Secretary of the Interior under date of June 7, 1907. In disposing of this question the following language is used:

> "The homestead entry was wrongfully allowed as to the conflict with the prior placer entry, but inasmuch as it has been shown that the land in the forty-acre subdivision in which the conflict exists is not mineral in character, the placer entry will be cancelled to the extent of the conflict, and the homestead entry may be permitted to stand with respect thereto, so far as the government is concerned, provided no intervening rights have attached."

The language clearly relegates the parties to the controversy to the courts for a determination of their respective rights. The conclusion and order is upon the erroneous assumption that homestead patent may issue to agricultural land, not mineral, although included within the boundaries of a valid and subsisting mining claim. It is to be remembered that congress has fixed the area of a mining claim, and it is neither for the court or the Land Department to reduce that area.

While the Honorable Secretary states the homestead entry was wrongfully allowed, he refuses to grant any relief, but leaves that to the parties and the proper tribunals—orders the patent to issue and that the placer entry be cancelled to the extent of the conflict, so far as the government is concerned. The Land Department divests the title of the government apparently in the least laborious way, subject to the equities of the claimants. Bearing in mind that Elisha S. Kirk was not a party to the proceeding, nor had any notice thereof, that the question for determination was upon the order for the homestead entryman to show cause why his homestead entry should not be cancelled to the extent of the conflict with the Kirk placer, upon the sole question of the priority of the entry, and the order itself reciting: "Inasmuch as the proof relating to said Kirk placer is found regular, the same could now be passed to patent were it not for the conflict with said homestead entry," (Record, 20); an order upon the showing of cause affecting the validity of the entry of the Kirk placer, surely cannot be given any force or effect. The question submitted by the show cause order does not suggest an inquiry as to the character of the lands involved in the conflict, nor is that question material upon the question of the validity of the Kirk placer claim, a single discovery entitling the claimants to 160-acre location.

Taking into consideration the effect of the location of the Kirk placer, confirmed and approved by the Land Department whenever its validity has been questioned, the payment of the acreage, the issuance of the final receipt, under which the department held the plaintiffs in error entitled to patent but for the conflict with the homestead entry, we believe the court should have decreed the grantor of the defendant in error to have taken title in trust for the owners of the Kirk placer, as to the conflict, as demanded in the cross complaint, (Record, 4), or at least have defeated the action for possession, on the part of the defendant in error, of the lands in conflict, segregated by valid location and entry of the Kirk placer claim from the public domain at the time of the entry, final proof, and issuance of patent to the homestead claimant. ant.

We respectfully pray that the judgments and decrees brought up for review be in all things reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 81.

FRANK L. KIRK, ELISHA S. KIRK, AND ELMA E. KIRK,
Plaintiffs in Error,

vs.

HANS OLSON, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

BRIEF FOR DEFENDANT IN ERROR.

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SUBJECT INDEX.

	Page
oints of Law Stated	1
Vrit of Error Should be Dismissed for Lack of Jurisdiction	2
nited States Patent upon which the Title of Defendant in Error is Based Unassailable in this Action	7
eply to Brief and Argument of Plaintiffs in Error	15
Reply to Proposition I	15
Reply to Proposition II	20
Reply to Proposition III	24
Reply to Proposition IV	25
Reply to Proposition V	26
Reply to Proposition VI	27
Reply to Proposition VII	27
inal Proof Notice given by Grantor of Defendant in Error Bars claim of Elisha S. Kirk	22
ossession of Entire Tract Prior to Patent by Grantor of Defendant in Error Unnecessary	26
laintiffs in Error not Entitled to Relief of Resulting Trust	28

CITATION OF AUTHORITIES.

bleman vs. Booth, 21 How., 506	3
yres vs. U. S., 42 C. Cls., 385	15
aker vs. Baldwin, 187 U. S., 61	3
aldwin vs. Keith, 13 Okla., 624, 75 Pac., 1124	28
arden vs. Railroad Co., 154 U. S., 288, 327	14
artlett vs. Lockwood, 160 U. S., 357	3
eals vs. Cone, 188 U. S., 184	6
ertwell vs. Haines, 10 Okla., 469, 63 Pac., 702	28
ette vs. Amonett, 4 La. Ann., 363	19
urke vs. So. Pac. R. R. Co., *et al.*, 234 U. S., 669	14
alifornia Powder Works vs. Davis, 151 U. S., 389	4
arr vs. Fife, 156 U. S., 494	14
effebach vs. Hawke, 115 U. S., 392	23
elamar's Nevada Gold Min. Co. vs. Nesbit, 177 U. S., 523	6
amond Coal & Coke Co. vs. U. S., 233 U. S., 236	14, 24
redge vs. Forsythe, 67 U. S., 563	20
erry vs. Street, 4 Utah, 521	13
orida Cent. & P. R. Co. vs. Bell, 176 U. S., 321	6
orbes vs. Driscoll, 4 Dak., 336	11
ench vs. Fyan, 93 U. S., 169-172	14
lton vs. McAftee, 16 Pet., 149	6
bson vs. Choteau, 13 Wall., 92	14
rdon vs. Caldcleugh, 3 Cranch, 268	3
villem vs. Donnalen, 115 U. S., 45	23
amblin vs. Western Land Co., 147 U. S., 531	6
arrington vs. Wilson, 10 S. D., 606-608	15
awley vs. Diver, 178 U. S., 476	19
eath vs. Wallace, 138 U. S., 573-585	14
meson vs. James, 100 Pac. (Cal.), 700	29
hnson vs. Towsley, 13 Wall., 73-83	11
erns vs. Lee, 142 Fed., 995	22, 23
err vs. Snowden (Cal. App.), 140 Pac., 704	14

	Page
King vs. McAndrews (C. C. A.), 111 Fed., 860	8, 19
Knight vs. Association, 142 U. S., 161-212	14
Lee vs. Johnson, 116 U. S., 48, 49	14
Logan vs. Davis, 233 U. S., 613	14
Lyle vs. Patterson (C. C. A.), 176 Fed., 909	28
McClung vs. Silliman, 6 Wheat., 598	3
McIntire vs. Wood, 7 Cranch, 504	3
Marquez vs. Frisbee, 101 U. S., 476	12
Menard vs. Aspasia, 5 Pet., 505	3
Michigan Land & Lumber Co. vs. Rust, 168 U. S., 589, 592-3	18, 19
Minter vs. Crommelin, 18 How., 87-89	14
Missouri vs. Andriano, 138 U. S., 496	5
Montgomery vs. Hernandez, 12 Wheat., 129	3
Noble vs. Railroad Co., 147 U. S., 174	14
Paine vs. Foster, 9 Okla., 213, 53 Pac., 159; 9 Okla., 257, 59 Pac., 252	19, 28
People vs. McKelvey, 19 Colo. App., 131, 74 Pac., 533	8
Pierson vs. Loveland (Ida.), 102 Pac., 340	28, 29
Quinby vs. Conlon, 104 U. S., 26	12
Reddall vs. Bryan, 24 How., 420	3
Refining Co. vs. Kemp, 104 U. S., 636, 645-647	11, 14
Ryan vs. Thomas, 4 Wall., 603	3, 5
Sanford vs. King, 19 S. D., 334-347	15
Shepley vs. Cowan, 91 U. S., 330	14, 29
Shoshone Mining Co. vs. Rutter, 177 U. S., 505	6
Sparks vs. Pierce, 115 U. S., 408	23
Steele vs. Smelting Co., 106 U. S., 447, 451	13
Stewart vs. McHenry, 159 U. S., 643	14
Strader vs. Baldwin, 9 How., 261	3
U. S. vs. O. & C. R. R. Co., 186 Fed., 861	15
U. S. vs. Schurz, 102 U. S., 378-401	14
Vantongeren vs. Heffernan, 5 Dak., 180-182	15
Waters-Pierce Oil Co. vs. Texas, 212 U. S., 97	3
West vs. Edward Rutledge Timber Co., 210 Fed., 189	14
Whitehill vs. Victorio Land & Cattle Co. (N. M.), 139 Pac., 184	14
Williams vs. Norris, 12 Wheat., 117	3

IN THE

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IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

BRIEF FOR DEFENDANT IN ERROR.

CONTENTIONS OF DEFENDANT IN ERROR.

The defendant in error contends:

1. That the writ of error should be dismissed for lack of jurisdiction.

2. That the United States patent, upon which the title of

the defendant in error is based, is unassailable in this action.

3. That plaintiffs in error have wholly failed to show any sufficient legal or equitable grounds for reversing the decision of the Supreme Court of the State of South Dakota.

JURISDICTION LACKING.

The defendant in error claims that the writ of error should be dismissed for lack of jurisdiction. This position is based upon grounds which appear amply sufficient to justify affirmation of the decision of the Supreme Court of the State of South Dakota without a consideration of any other phase of this case. The writ is governed by the provisions of Section 237 of the Judicial Code of the United States, which are, in part, as follows:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity . . . or where any title, right, privilege or immunity is claimed under the Constituion, or any treaty or statute of, or commission held or authority exercised under the United Staates, and the decision is against the title, right, privilege or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error."

The decision of the Supreme Court of South Dakota was in favor of patent issued to grantor of defendant in error. The plaintiffs in error are attempting to attack the validity of this patent. The decision of the State Supreme Court having been given in favor of the validity of the United

States patent, the Supreme Court of the United States has no jurisdiction to review such decision. Section 237 of the Judicial Code is a re-enactment, without any change whatever, of Section 709 of the United States Revised Statutes. It has been held in a number of decisions that in order to give the Supreme Court of the United States the right to review the decision of the Supreme Court of the State, there must be a denial by the State court of some Federal right, whether those pertaining to the constitutionality of Federal or State statutes, or to certain rights, immunities and privileges of Federal origin, especially set up in the State court and denied by the rulings and judgment of that court. Waters-Pierce Oil Co. vs. Texas, 212 U. S., 97. See also Gordon vs. Caldcleugh (1806), 3 Cranch, 268; McIntire vs. Wood (1813), 7 Cranch, 504; McClung vs. Silliman (1821), 6 Wheat., 598; Williams vs. Norris (1827), 12 Wheat., 117; Montgomery vs. Hernandez (1827), 12 Wheat., 129; Menard vs. Aspasia (1831), 5 Peters, 505; Strader vs. Baldwin (1850), 9 How., 261; Ableman vs. Booth (1858), 21 How., 506; Reddall vs. Bryan (1860), 24 How., 420; Ryan vs. Thomas (1866), 4 Wall., 603; Baker vs. Baldwin (1902), 187 U. S., 61; Bartlett vs. Lockwood, 160 U. S., 357.

The brief of counsel for plaintiffs in error calls attention to a letter from the Honorable Secretary of the Interior under date of June 7, 1907, in which it is stated:

> " . . . the placer entry will be cancelled to the extent of the conflict and the homestead entry may be permitted to stand with respect thereto so far as the Government is concerned, provided no intervening rights have attached."

They argue that this language leaves the matter in controversy to be determined by the courts. Admitting for

the sake of argument that this was the intention of the Secretary of the Interior, in issuing this patent, it does not follow that the Supreme Court of the United States would have jurisdiction to review the adjudication of the rights of these parties made by the State courts of South Dakota. The rights of the parties have been decided by the proper courts and the decision has been in favor of the validity of the United States patent upon which title of defendant in error is based. In the case of California Powder Works vs. Davis, 151 U. S., 389, Mr. Chief Justice Fuller held:

> "It is axiomatic that in order to give this court jurisdiction on writ of error to the highest court of the State in which a decision in the suit could be had, it must appear affirmatively not only that a Federal question was presented for decision by the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause and that it was actually decided or that the judgment as rendered could not have been given without deciding it. And where the decision complained of rests on an independent ground not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering any Federal question that may also have been raised. Eustis vs. Bolles, 150 U. S., 361."

In Carpenter vs. Williams, 9 Wall., 785, which was an action to determine a title confirmed by the United States, Mr. Justice Miller says:

> "The decision of the court below denies the validity of no act under authority of the United States. It recognizes to its fullest extent the title confirmed by the act of Congress and the act of confirmation, and only determines to whom that confirmation was made.
>
> "It is a mistake to suppose that every suit for real estate in which the parties claiming under the Federal

> Government are at issue as to which of them is entitled to the benefit of that title, necessarily raises a question of Federal cognizance.
>
> "If this were so, the title to all the vast domain once vested in the United States could be brought from the States to this tribunal."

In Missouri vs. Andriano, 138 U. S., 496, Mr. Justice Brown held that:

> "When a decision of a State court is in favor of a right or preference claimed under a statute of the United States, this court has no jurisdiction to review it. The object of the present judicial act was not to give the right of review whenever the validity of an act of Congress was drawn in question, but to prevent the courts of the several States from impairing or frittering away the authority of the Federal Government by giving a construction of its statutes adverse to such authority. Of course, if the construction given by the State court to the act under which the right is claimed is favorable to such right, no such reason exists for a review by this court."

Ryan vs. Thomas, 4 Wall., 608, is directly in point with the present action. This was a suit to recover a tract of land in St. Louis, Missouri. The proofs of plaintiff consisted of a patent from the United States to one Johnson, dated January 5, 1843, the certificate of entry from the United States Land Office, an assignment by Johnson and the plaintiff endorsed on the certificate, and a decree of default of the St. Louis land court. Defendants claimed that Johnson was a fictitious person. The lower court upheld the United States patent. Mr. Chief Justice Chase said:

> "The patent offered by the plaintiffs seems to have been the only authority under the United States drawn in question in the State court, and the decision was in favor of its validity. *It is only when in such a case the decision is against the authority that this court has revisory jurisdiction.*"

In Delamar's Nevada Gold Min. Co. vs. Nesbit, 177 U. S., 523, it was said:

> "It is manifest that the object of Section 709 was not to give a right of review whenever the validity of an act of Congress was drawn in question, but to prevent States from frittering away the authority of the Federal Government by limiting too closely the construction of the Federal statutes. Hence, the writ of error will only lie where the decision is adverse to the right claimed" (citing cases).

In Florida Cent. & P. R. Co. vs. Bell, 176 U. S., 321, Mr. Justice Shiras held:

> "In view of the frequent and recent decisions of this court on this subject, it is not necessary to argue the proposition that the mere assertion of a title to land derived to the plaintiffs under and by virtue of a patent granted by the United States presents no question which of itself confers jurisdiction on a Circuit Court of the United States. Blackburn vs. Portland Gold Mining Co., 175 U. S., 571. . . ."

See also Fulton vs. McAfee, 16 Peters, 149; Shoshone Mining Co. vs. Rutter, 177 U. S., 505; Beals vs. Cone, 188 U. S., 184; Hamblin vs. Western Land Co., 147 U. S., 531; Note in 91 American Decisions, 197; Note in 63 L. R. A., 33-54.

The United States Patent Upon Which Title of Defendant in Error is Based, Unassailable in this Action.

The statement by plaintiffs in error of the questions involved in this case is noticeably incomplete. Neither in such statement nor in the brief and argument which follow is there any reference to the vital question which the Supreme Court of the State of South Dakota decided controlled absolutely the decision of the matters involved in this case. That question is:

> Can the United States patent upon which is based the title of defendant in error be attacked in this proceeding?

This action was brought by Hans Olson, the defendant in error here, in the Circuit Court of Custer County, South Dakota, to quiet his title to certain lands, which had been patented to his grantor, John Bostrom, by the United States. A portion of the tract was claimed by the Kirks, the present plaintiffs in error. The area in conflict was, at one time, included in a placer location made by the Kirks. They claimed this land was valuable mining ground, while Bostrom contended that it was worth most for agricultural purposes. Various proceedings were had in the United States Land Department, as a result of which the Honorable Secretary of the Interior, affirming the concurring decisions of the local land office and the Commissioner of the General Land Office, found the land in conflict was valuable farming land and non-mineral in character. The placer claim was ordered cancelled to the extent of the conflict with the homestead, and a patent issued to the homestead entryman.

Plaintiffs in error contend that the decisions of the Land Department were erroneous. A careful consideration of

the proceedings had within the Land Department shows no ground for such a contention, but even if the Departmental decisions were wrong, it is well settled by numerous opinions of this court and of the lower Federal and the State Courts, that plaintiffs in error can not raise the question in this proceeding. All the matters referred to in the amended answer of plaintiffs in error had been carefully considered by the various tribunals within the United States Land Department, the decisions had been adverse to the Kirks and in favor of John Bostrom—Olson's grantor—and as a result the land had been patented to Bostrom and deeded by him to Olson long before this action was commenced. The patent was not subject to collateral attack, and the courts acquired no jurisdiction in this case to determine any of the various matters referred to in the affirmative defense of plaintiffs in error. The fact that the defendants below sought to attack the patent by affirmative allegations in their answer does not make the attack any the less a collateral one. People vs. McKelvey, 19 Colo. App., 131, 74 Pac., 533.

A careful consideration of the decisions leads to the inevitable conclusion that plaintiffs in error can not attack the United States patent upon which Olson's title is based for two reasons, viz.:

1. A United States patent is not subject to collateral attack.

2. The decisions of the United States Land Department are conclusive on all questions of fact.

Although these two propositions are distinct, they are both referred to so frequently in the same decisions that it seems best to consider them together. The authorities to sustain both statements are numerous and there is little, if any, conflict in the tenor of the decisions.

The decision of the South Dakota Supreme Court is based upon King vs. McAndrews (C. C. A.), 111 Fed., 860. In

this case one George H. King brought action of ejectment in United States Circuit Court against McAndrews and others to acquire possession of certain lands. The plaintiff had a patent which he offered in evidence at the trial and the court sustained objection to it on the ground that it was void because the land therein described was within the corporate limits of the city of Chamberlain, South Dakota, when the patentee entered it. This ruling defeated the plaintiff's claim. On appeal to the Circuit Court of Appeals, Judge Sanborn reversed the decision of the lower court and held good the title of the plaintiff secured by his patent. In the course of the decision, the court says (page 863):

> "The land department of the United States, including in that term the Secretary of the Interior, the Commissioner of the General Land Office, and their subordinate officers, consists of a special tribunal vested with judicial power to hear and determine the claims of all parties to the public lands which it is authorized to dispose of, and with power to execute its judgments by conveyances to the parties entitled to them."
>
> "A patent of land within its jurisdiction issued by the land department is the judgment of that tribunal and a conveyance of the legal title to the land to the patentee in execution of the judgment."
>
> "When such a patent to land within the jurisdiction of the department is issued, it is like the judgments of other judicial tribunals *impervious to collateral attack.*"
>
> "But the land which the department is vested with the power and charged with the duty to hear and decide the claims of applicants for, and to dispose of in accordance with its decisions, is within its jurisdiction and its patent of such land conveys the legal title to it and is *impervious to collateral attack whether its decision is right or wrong*" (citing cases).
>
> "The test of jurisdiction is not right decision but the right to enter upon the inquiry and to make some decision. Foltz vs. Railroad Co., 60 Fed., 316, 318;

U. S. vs. Winona & St. P. R. Co., 67 Fed., 959. Hence a patent evidencing an erroneous decision of a question of law or a mistaken determination of an issue of fact which the department was vested with the power and charged with the duty to decide is as impervious to collateral attack as one which is the result of correct conclusions."

"These established principles have been re-stated and these authorities have been again cited because they control the disposition of the case in hand and because counsel for the defendant seem to be impressed with the view that every decision by the land department of the many grave and complicated issues which condition the rightful issue of a patent is a mere ministerial act open to collateral attack for every error of law into which the officers of that department may fall in every action at law in which the title under the patent is involved. Such is not the law. The decisions of that department are judicial acts. The patents it issues are judgments of a quasi judicial tribunal. In cases within its jurisdiction they are presumptively right and as impervious to collateral attack for errors of law or for mistakes of fact as the judgment of the courts; and all cases are within the jurisdiction of this department in which Congress has entrusted to it the determination of the rights of the claimants and the disposition of the land in accordance with its decision."

"But the general rule is that the disposition of the public lands of the United States is entrusted to this department (land department) and the patent itself is presumptive evidence both that the department had jurisdiction to decide whether or not the patentee was entitled to it and that its decision of that question was right. It follows that if there might have been any state of facts which would have given the department jurisdiction of this case and the power to issue a patent to this land under the acts of Congress, the presumption is that such a state of facts existed and that the department had jurisdiction of the case. Upon this

> subject the Supreme Court said in Refining Co. vs. Kemp, 104 U. S., at page 646: 'Indeed the doctrine as to the regularity and validity of its acts (meaning the land department) where it has jurisdiction, goes so far that if in any circumstances under existing laws, a patent would be held valid, it will be presumed that such circumstances existed.' "

After reviewing the authorities at length, the court held that the patent was conclusive evidence of the title in the patentee.

In the early Dakota decision of Forbes vs. Driscoll, 4 Dak., 336, the authorities are exhaustively reviewed and the court says:

> "It is very clear from the decisions of the Federal Courts that it (the U. S. land department) is given such judgment and discretion and quasi judicial powers that its decisions are not open to review by the courts in a collateral attack, and its officers are free from control of the courts to compel or restrain their action in any matter before them not purely ministerial."
>
> "Courts of law can in no case review the action of the land department after it has acted by declaring, in effect, its acts illegal and voidable . . . and that when the jurisdiction of a court of equity is invoked, the error complained of must come clearly within one of the well-known grounds of equity jurisdiction."

In Johnson vs. Towsley, 13 Wall., 73-83, Mr. Justice Miller holds:

> "But while we find no support to the proposition of the counsel for the plaintiffs in error in the special provisions of the statute relied on, it is not to be denied that the argument is much stronger when founded on the general doctrine that, when the law has confined to a special tribunal the authority to hear and determine

certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others. That the action of the land office in issuing a patent for any of the public lands subject to sale, by pre-emption or otherwise, is conclusive of the legal title, must be admitted under the principle above stated; and in all courts, and in all forms of judicial proceedings where this title must control, either by reason of the limited powers of the court, or the essential character of the proceeding, no inquiry can be permitted into the circumstances under which it was obtained."

Again the court says in Marquez vs. Frisbee, 101 U. S., 476:

"The decisions of the officers of the land department, made within the scope of their authority on questions of this kind, are, in general, conclusive everywhere, except when considered by way of appeal within that department; and that as to the facts on which this decision is based, in the absence of fraud or mistake, that decision is conclusive, even in courts of justice where the title afterwards comes in question."

In the case of Quinby vs. Conlon, 104 U. S., 26, the court says:

"It would lead to endless litigation, and be fruitful of evil, if a supervisory power were vested in the courts over the action of the numerous officers of the land department, on mere questions of fact presented for their determination. It is only when those officers have misconstrued the law applicable to the case as established before the department, and thus have denied the parties rights which upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practiced necessarily affecting their judgment, that the courts can, in a proper

> proceeding, interfere and refuse to give effect to their action. On this subject we have repeatedly and with emphasis expressed our opinion, and the matter should be deemed settled. . . . And we may also add, in this connection, that the misconstruction of the law by the officers of the department which will authorize the interference of the court must be clearly manifest, and not alleged upon possible finding of the facts from the evidence different from that reached by them."

Mr. Justice Field in Steele vs. Smelting Co., 106 U. S., 447, 451, rules:

> "We have so often had occasion to speak of the land department, the object of its creation, and the powers it possesses of the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that the counsel in discussing the effect to be given to the action of that department overlook our decisions on the subject. That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of title from the United States to portions of the public domain is obtained, and to see that the requirements of the different acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions."

The question of the character of the tract in controversy was considered by the department before the issuance of patent to grantor of defendant in error, and it was decided that the lands were agricultural and not mineral in character (Folio 23, Record). The court said in the case of Ferry vs. Street, 4 Utah, 521:

> "The judgment of the land department that lands are non-mineral or unoccupied, which question it is called on to consider before issuing a patent, is unassailable except in a direct proceeding for the annulment of the patent."

See also West vs. Edward Rutledge Timber Co., 210 Fed., 189; Whitehill vs. Victorio Land & Cattle Co. (N. M.), 139 Pac., 184; Kerr vs. Snowden (Cal. App.), 140 Pac., 704; Logan vs. Davis, 233 U. S. 613.

In the case of Burke vs. S. Pac. R. R. Co., *et al.*, 234 U. S. 669, Mr. Justice Van Devanter says:

> "The exclusion of mineral lands is not confined to railroad land grants but appears in the homestead, desert land, timber and stone, and other public land laws, and the settled course of decision in respect of all of them has been that the character of the land is a question for the land department the same as are the qualifications of the applicant and his performance of the acts upon which the right to receive the title depends and that when a patent issues it is to be taken upon a collateral attack as affording conclusive evidence of the non-mineral character of the land and of the regularity of the acts and proceedings resulting in its issue."

See also Minter vs. Crommelin, 18 How., 87-89; Gibson vs. Choteau, 13 Wall., 92; Shepley vs. Cowan, 91 U. S., 330; French vs. Fyan, 93 U. S., 169-172; U. S. vs. Schurz, 102 U. S., 378-401; Refining Co. vs. Kemp, 104 U. S., 636, 645-647; Lee vs. Johnson, 116 U. S., 48, 49; Heath vs. Wallace, 138 U. S., 573, 585; Knight vs. Association, 142 U. S., 161-212; Noble vs. Railroad Co., 147 U. S., 174; Barden vs. Railroad Co., 154 U. S., 288, 327; Carr vs. Fife, 156 U. S., 494; Stewart vs. McHenry, 159 U. S., 643; Diamond Coal & Coke Co. vs. U. S., 233 U. S., 236; Ayres

vs. U. S., 42 Ct. Cl., 385; U. S. vs. Ore. & C. R. Co., 186 Fed., 861; Vantongeren vs. Heffernan, 5 Dak., 180-192; Harrington vs. Wilson, 10 S. D., 606-608; Sanford vs. King, 19 S. D., 334-347.

REPLY TO BRIEF AND ARGUMENT OF PLAINTIFFS IN ERROR.

The propositions advanced by plaintiffs in error will now be considered in the order given in their brief.

I.

In the first place, they claim that the lands in conflict were segregated from the public domain prior to the issuance of a patent to grantor of defendant in error by reason of certain proceedings in the Land Office involving the Kirk placer claim. They argue that the patent to Bostrom, grantor of defendant in error, conveyed no title. An analysis of the facts as shown by the record proves this contention to be unsound.

Frank L. and Elisha S. Kirk made mineral entry No. 1267, February 15, 1902, for the Kirk placer claim. By letter of July 18, 1903 (Folio 31, Record), the Commissioner of the General Land Office required the Register and Receiver of the United States Land Office at Rapid City to notify the placer claimants that they would be allowed sixty days from receipt of notice within which to show cause why their mineral entry should not be cancelled because of failure of same to conform to legal subdivisions of ten acres or more where possible. They were also required to make a showing as to the character of the land within their placer entry, owing to the report of Seth Bullock, Forest Supervisor, that the land was agricultural in character.

By letter of December 10, 1903 (Folios 33-36, Record), the Commissioner of the General Land Office reiterates the

statements contained in certain *ex parte* affidavits filed by the Kirks and others as to the character of the land and states that "The showing as to the improvements and mineral character of the land *appears* to be sufficient." The placer entry was held for cancelation for failure to conform to legal subdivisions where possible. The latter part of this decision of the Commissioner was appealed from, and on June 30, 1904, the Secretary reversed the Commissioner's decision, stating that it appeared that conformity with the system of public land surveys would so change the proportion and shape of the claim on the ground as to exclude from the limits thereof a large part of the improvements made (Folios 37-39, Record). It will thus be seen that the question of the character of the land was not passed upon by the Secretary of the Interior at all at this time and was decided by the Commissioner solely upon the *ex parte* affidavits of the Kirks and their friends. A decision as to the character of the land based upon a hearing, in which both agricultural and mineral claimants had an opportunity to be heard, was not rendered by the land department until in the proceedings between Bostrom, grantor of defendant in error, and the Kirks, after Bostrom had made final proof on his homestead entry. These proceedings all involved the question of the character of the land, whether it was mineral or agricultural. The Kirks claimed it was mineral—they are still trying to hold it as a placer although the evidence is undisputed that it will raise fifty bushels of oats to the acre (Folio 111, Record), and that no mineral of value has been discovered upon it (Folio 23, Record). This question was fully and fairly considered by every tribunal within the land department. Without exception they decided that the land was agricultural in character and should be awarded to the homestead claimant. Defendant in error desires to call particular attention to the language of the

Commissioner of the General Land Office (Folios 50-51, Record) as follows:

> "Instead of being used for placer mining purposes, the land covered by the Kirk placer survey has been used for many years by the Kirk brothers for agricultural purposes. In a report dated April 18, 1903, the forest ranger reported that the improvements on the placer mining location consisted of a six-room house 22x34½ ft., frame milk house 12x36 ft., log tool house 16x34 ft., two frame barns with stone basements, one 32x40½, the other 30x42½ ft., and a frame shed, 12x36 ft. It is also stated that 140 acres of the land are suitable to tilling, 125 acres being under plow, the total area of the placer, as surveyed, being 157.929 acres. It is also stated in said report, that during the past season there have been raised on the ground 3,200 bushels of grain, 15 tons of hay, and 150 bushels of potatoes."
>
> "The testimony taken at this hearing corroborates the report of the forest ranger, so far as the character of the land is concerned. The land is level, a considerable portion with deep, rich soil and of considerable value for agricultural purposes. The placer claimants are farmers, and seem to have been engaged exclusively in that occupation. I am satisfied that for agricultural purposes the land is of far greater value than it is for the mineral it contains."

Upon appeal to the Secretary of the Interior, it was said (Folio 22, Record):

> "It is contended by the appellants that entry having been allowed for the Kirk placer claim prior to the allowance of the homestead entry the question of the character of the land in the former is not now a proper subject of inquiry. This contention can not be sustained. It is too well settled to need discussion that the land department has the jurisdiction and power, and that it is its duty, to inquire into and determine questions brought to its attention, touching the validity of

> claims asserted under the public land laws, at any time prior to the issuance of patent. (Michigan Land and Lumber Co. vs. Rust, 168 U. S., 589, 592-3; Purcher vs. Gillem, 26 L. D., 34, 39-41; F. A. Hyde & Co., 33 L. D., 639, and cases cited.)"

And the Secretary concludes (Folio 23, Record):

> * * *"that no mineral of value has been discovered on the above described tract and the evidence shows that such land has been used for many years for agricultural purposes by the mineral claimants and that it is chiefly valuable for such purposes. The evidence carefully considered sustains the concurring conclusions below respecting the land in controversy between the placer and homestead claimants."

From the subsequent proceedings in the land department, it appears that on May 15, 1909, the Commissioner of the General Land Office directed the local officers at Rapid City to notify the placer claimants that they would be allowed sixty days within which to apply to the Surveyor General for an amended survey to eliminate the portion situate in the NW¼ NW¼ of Sec. 8, and that in default thereof their mineral entry would be cancelled in its entirety (Folios 24-25, Record). The matter of an amended survey was further considered on review by the Commissioner (Folios 114-117, Record) who directed the Surveyor General to amend the survey in his office with distinctive ink upon the official plat. The amendment was made, as shown by the official plat, plaintiff's Exhibit F (Folio 26, Record) and mineral entry No. 1267 for the Kirk placer was cancelled in part by Commissioner's letter of March 24, 1910 (Folio 25, Record). Under date of February 11, 1911, the certificate of entry of Bostrom was amended so as to include in the homestead entry the portion formerly in conflict with the Kirk placer (Folio 26, Record).

It is undoubtedly true that an entry segregates from the public domain the land therein embraced for the time being, but it is equally true that the land department can and frequently does cancel an entry wrongfully allowed, and patents to another claimant the land formerly contained therein. The entryman has a mere inchoate title prior to patent, and the question of which of two claimants is entitled to a patent is one for the decision of the land department. That it has the jurisdiction and power and that it is its duty to inquire into and determine such questions at any time prior to the issuance of patent, and if necessary cancel an existing entry, is, as stated by the Secretary of the Interior, "too well settled to need discussion." It was said in Hawley vs. Diller, 178 U. S., 476: "The land department has jurisdiction to cancel an original entry for public lands at any time before a patent is issued." See also Michigan Land and Lumber Co. vs. Rust, 168 U. S., 589, 592-3; King vs. McAndrews, 111 Fed., 860; Paine vs. Foster, 9 Okla., 213, 53 Pac., 159, affirmed on review 9 Okla., 257, 59 Pac., 252; Bette vs. Amonett, 4 La. Ann., 363. The decision of this tribunal upon the facts is conclusive upon the courts, as already shown.

A careful reading of all the decisions cited by appellants under this subdivision will show that they were rendered in cases where a direct attack had been made upon a United States patent, and that none of them goes further than to lay down the proposition that an entry of public lands operates to segregate the tract covered thereby from the public domain so long as such entry remains intact. The facts of these cases are entirely different from those of this controvery. No decision can be found holding that such segregation prevents the subequent cancellation of the entry and the patenting of the land previously covered thereby to another claimant. The mere naked possession of the land

by the Kirks can not—in the absence of the running of the statutory time for claiming title by prescription—operate to give them title to this tract as against a claimant under a United States patent. The Supreme Court of the United States has said in Dredge vs. Forsythe, 67 U. S., 563:

> "A patentee of a quarter-section is secure in his title to the whole of it if he has been in possession of a part, claiming the whole, for seven years, though it has been subdivided into lots upon some of which he had no actual residence or occupancy."

II.

The second claim of plaintiffs in error is that the cancellation of that portion of the Kirk placer in conflict with the Bostrom homestead entry was void and ineffectual. They say (*a*) that the validity of the Kirk placer had been adjudicated before the cancellation of a portion of that claim. As already shown (page — hereof) the question of the character of the land was never passed upon by the Secretary of the Interior until in the proceedings between the Kirks and Bostrom, grantor of defendant in error, after Bostrom had made final proof on his homestead entry. The land was then found to be agricultural in character. It is true that the Commissioner of the General Land Office considered the question at one time and decided, solely on the *ex parte* affidavits of the Kirks and their friends, that the land was apparently mineral. Plaintiffs in error say (page 10 of their brief) that the proceedings therein referred to were the only proceedings instituted involving the validity of the Kirk placer. But not only was the area in conflict here the subject of various proceedings within the land department, which finally resulted in it being awarded to the homestead entryman, but it is undisputed that proceedings

are now pending between the United States and the Kirks with a view of cancelling the remaining portion of the Kirk placer on the ground of its non-mineral character (Folio 112, Record).

Under sub-heads *b* and *c*, plaintiffs in error assert that Elisha S. Kirk, co-owner in Kirk placer mine, was not a party or given notice and that the issues did not involve the character of the lands in conflict.

The first contention is not sustained by the records introduced or the evidence submitted in this case. At the trial of this action Elisha S. Kirk himself tetified on cross-examination that Mr. Grantham was his attorney during the pendency of the proceedings resulting in the cancellation of a portion of the Kirk placer claim (Folios 16-17, Record). This is confirmed by the following statement from the affidavit of Mr. Ed. L. Grantham, attorney for plaintiffs in error (Folio 110, Record):

> "Ed. L. Grantham, being first duly sworn, deposes and says: I am attorney for the defendants herein and have been attorney for them and in charge of the matter of title of the Kirk Placer claim since about 1902 or 1903, and have had charge of the proceedings in Land Office and in the Department of the Interior with reference thereto."

By their own Exhibit 10 (Folio 47, Record) it is shown that the parties appeared with witnesses on May 8, 1905, before the local Land Office. And in the same exhibit (Folio 49, Record) the Commissioner says:

> "The placer *claimants* attempted to show that the mining claim was valuable for its deposits of placer gold and of fire clay, and known to be so valuable prior to the date of the allowance of final homestead cash

> entry. The witnesses testified to panning the ground contained within the exterior boundaries of the placer and particularly that portion found in these pannings. It was also testified that underlying the gravel in which the deposits of gold are said to be contained, is a bed of fire clay of good quality. It is in evidence, however, that no mining operations to amount to anything, have ever been conducted upon any portion of the Kirk placer, and no gold in excess of $1.00 in value has ever been taken therefrom by the placer claimants, during all the years it has been held by them."

But if Elisha S. Kirk had not been notified of the particular hearing to which plaintiffs in error refer, it would not afford ground for setting aside the homestead patent. Exhibit 9 (Folio 42, Record) shows that the entire proceeding in question, which resulted in the cancellation of a portion of the Kirk placer, was upon the protest of Frank L. Kirk (one of the plaintiffs in error herein) and William A. Nevins against Bostrom's homestead entry, "alleging conflict between the Kirk Placer and the Monatomic Lode claims and the homestead . . ." Upon this protest the homestead entryman was required to make a showing. The placer claimants were the moving parties—the protestants—and if Elisha S. Kirk did not join in the protest, he was guilty of laches of which he should not now be permitted to take advantage. The publication by Bostrom of his intention to submit final proof on his homestead, was sufficient notice to Elisha S. Kirk to come in and protect any rights that he may have had. Frank L. Kirk and William A. Nevins evidently so considered it and filed a joint protest against the homestead entry. If Elisha S. Kirk was not represented in this protest, here was his opportunity to appear. As the court says in the case of Kerns vs. Lee, 142 Fed., 995:

> "So in the case at bar the usual notice given which precedes final proof on a homestead entry afforded opportunity to plaintiff to appear and contest the right of the homesteader to his patent . . . but failing in such appearance he is precluded by the determination by the Secretary of the Interior that the homesteader was entitled to a patent."

And in the case of Gwillen vs. Donnalen (115 U. S., 45), the Supreme Court of the United States says:

> "In proceedings to obtain a patent for a mining claim where an adverse claim is not interposed, the United States may assume that no such claim exists and the holder thereof is barred, he being in law a party to the proceedings."

The statement is also made by plaintiffs in error that the issues did not involve the character of the land in conflict. It is hardly necessary to add to what has already been said upon this proposition. In the case of Deffebach vs. Hawke, 115 U. S., 392, Mr. Justice Field said:

> "It is plain . . . that no title from the United States to land known at the time of sale to be valuable for its minerals . . . can be obtained under the . . . homestead laws . . . or in any other way than as prescribed by the laws especially authorizing the sale of such lands. We say land *known* at the time to be *valuable* for its mineral, as there are vast tracts of public land in which minerals of this kind are found but not in such quantity as to justify expenditure in the effort to extract them. It is not to such lands that the term mineral in the sense of the statute is applicable . . ."

And in the case of Sparks vs. Pierce, 115 U. S., 408, Mr. Justice Field said:

> "To entitle a party to relief in equity against a patent of the Government, he must show a better right to the land than the patentee, such as in law should have been respected by the officers of the land department and being respected would have given him the patent. It must affirmatively appear that the claimant was entitled to it and that in consequence of erroneous rulings of those officers on the facts existing it was denied to him."

In Diamond Coal & Coke Co. vs. U. S., 233 U. S., 236, it was held:

> "To justify the annulment of a homestead patent as wrongfully covering mineral land, it must appear that at the time of the proceedings which resulted in the patent, the land was known to be valuable for mineral; that is to say, it must appear that the known conditions at the time of those proceedings were plainly such as to engender a belief that the lands contained mineral deposits of such quality and in such quantity as to render their extraction profitable, and justify expenditures to that end . . . The inquiry must be directed to the situation at that time, as were the applicant's proofs and the finding of the land officers."

III.

Plaintiffs in error assert that the patent as to the conflict involved is void because the lands embraced in the mineral entry were not subject to disposal by the United States. This matter has already been considered in discussing their first proposition. It should not be forgotten that the Kirk placer was cancelled in so far as it conflicted with the Bostrom homestead (Folio 24, Record) and the official survey amended so as to show such cancellation (Folio 25, Record). The Bostrom homestead, taken by legal sub-divisions according to the requirements of the homestead law, was per-

mitted to stand as to the land formerly in conflict with the Kirk placer claim.

IV.

It is contended by the plaintiffs in error that the subsequent cancellation of their prior entry does not validate the homestead entry. The area formerly in conflict was a triangular piece of land wholly contained within the NW¼ NW¼ of Section 8, Township 4 South, Range 4 East, B. H. M. The homestead claimant in making his entry was required under the law to take the same by legal subdivisions, if possible. The Bostrom homestead entry was made under the provisions of the Act of March 3, 1899 (30 Stat., 1095), which provided, in part, as follows:

> " . . . That any person who made actual bona fide settlement and improvement and established residence thereon in good faith for the purpose of acquiring a homestead upon lands more valuable for agriculture than for any other purpose within the boundaries of the Black Hills Forest Reservation in the State of South Dakota, prior to September ninth, one thousand eight hundred and ninety-eight, may enter *under the provisions of the homestead law* the lands embracing his or her improvements, not to exceed one hundred and sixty acres; and if the lands are so situated that the entry of a legal subdivision according to existing law will not embrace the improvements of such settler or claimant, he or she may make application to the Surveyor General of the State of South Dakota to have said tract surveyed at the expense of the claimant by metes and bounds and a plat made of the same and filed in the local land office showing the land embraced in his original settlement which he desires to enter not to exceed one hundred and sixty acres, and thereupon he shall be allowed to enter said land as per said plat and survey as a homestead; and the Secretary

of the Interior shall make the necessary rules and regulations to carry this act into effect. *Provided*, that in any case where, upon investigation by a special agent of the Interior Department and after due and proper hearing it shall be established that an entry interferes with the general water supply or was detrimental in any way to the public interests, or infringed upon the rights and privileges of other citizens, the Secretary of the Interior shall have authority to cause said entry to be modified or amended or *in his discretion* to finally cancel the same."

It will be noticed that Bostrom was required to make his entry "under the provisions of the homestead law," that is, by legal subdivisions of at least forty acres. A metes and bounds survey was provided for only in case a filing by forty-acre subdivisions did not embrace all of claimant's improvements. In no other instance could the homestead be taken by metes and bounds under this act. Bostrom was obliged under the provisions of this act to make his filing on all of the NW¼ NW¼ of Section 8, or none of it. If there was a conflict, the law provided a procedure for cancelling the homestead entry to the extent thereof. The whole matter was left by Congress to the Secretary of the Interior, who had the power "in his discretion" to modify, amend or finally cancel the entry. Congress promulgated by express legislative enactment for lands within the Black Hills Forest Reserve the rule already referred to, and recognized many times by this court: that the decisions of the United States Land Department are conclusive and final on questions of fact and not subject to interference by the courts.

V.

Plaintiffs in error say that a patent is not conclusive. There is no doubt that the courts may set aside a patent in

a suit brought within the proper time and by the proper party and for such purpose. But the various cases cited by plaintiffs in error under this subdivision recognize fully the rule heretofore referred to, namely, that a United States patent is not subject to collateral attack.

VI.

It is claimed that the defendant in error was not an innocent purchaser. The undisputed evidence shows that he did not purchase the Bostrom homestead until the rights of the various parties had been fully and fairly adjudicated by every tribunal within the United States Land Department, the Kirk placer cancelled as to the area in conflict with the homestead, and a United States patent issued to Bostrom. Defendant in error knew, as did everyone who had ever examined this land, that it was agricultural and not mineral in character. He was a witness for Bostrom in the contest, but only as to the character of the land in controversy, that being the question at issue. Knowing the character of the land to be agricultural and that the local land officers, the Commissioner of the General Land Office, and the Secretary of the Interior had decided it to be such, also that the mining claim had been cancelled as to the area in conflict, and that a United States patent had issued to Bostrom upon his entire homestead including the tract in controversy here, Olson can not be rightfully presumed to have had any knowledge of any alleged rights still claimed by the Kirks.

VII.

Finally, the plaintiffs in error allege that the homestead entry was fraudulent and void as to the area in conflict because it included lands embraced within the Kirk placer. We have already considered the provisions of the Act of

March 3, 1899 (30 Stat. 1095)—the reference to an act of 1889 being evidently erroneous since the Black Hills Forest Reserve was created by presidential proclamation of February 22, 1897, and enlarged by presidential proclamation of September 19, 1898.

The Act of April 15, 1902 (32 Stat. 106), merely extended for two years the time within which *bona fide* settlers within Forest Reserves might file their claims in a local land office.

In none of the cases cited under this section of the brief of plaintiffs in error is the question raised as to the character of the land. In Lyle vs. Patterson (C. C. A.), 176 Fed. 909, cited by plaintiffs in error, the Court says:

> "One suing to make a patentee trustee for himself can only recover on the strength of his own equity and not on defects in defendant's title."

A decree that the defendant in error holds the title to the land in conflict in trust for the plaintiffs in error is not proper in the present action, because the patent can not be collaterally attacked or the decision of the land department on questions of fact set aside as already shown, but even if this action were proper evidence of fraud must be clear. The rule is well stated in Baldwin vs. Keith, 13 Okla. 624, 75 Pac. 1124, as follows:

> "A petition in an action to declare a resulting trust which does not allege and show upon its face that the plaintiff has a better right to the land than the patentee such as in law should have been respected by the officers of the land department and being respected would have given him the patent, does not state facts sufficient to constitute a cause of action."

See also Lyle vs. Patterson (C. C. A.), 176 Fed. 909; Bertwell vs. Haines, 10 Okla. 469, 63 Pac. 702; Paine vs.

Foster, 9 Okla. 257, 59 Pac. 252; Jameson vs. James, 100 Pac. (Cal.) 700; Pierson vs. Loveland (Ida.), 102 Pac. 340.

In none of the cases referred to by the plaintiffs in error were the parties attempting to acquire title as placer mining claims to lands chiefly valuable for agricultural purposes. Plaintiffs in error do not allege that the area in conflict is mineral land, and it is undisputed that it is valuable only for farming purposes.

To reverse the decisions of the land department, which have been affirmed by the South Dakota courts, would be to permit persons perhaps not legally qualified as homestead entrymen to evade the plain provisions of the statutes and acquire valuable agricultural lands under the provisions of the mining laws. Why the Kirks did not file a homestead on the land, as they might have done under the provisions of the Act of March 3, 1899 (30 Stat. 1095), does not appear. If any of them had been qualified as homestead entrymen, it seems reasonable to suppose that they would have taken advantage of the provisions of this law. Instead of doing so, they attempted to secure a patent to this farm as a placer. There is no evidence as to the length of time Bostrom had been in possession of the tract that he later filed on as a homestead. He may have lived on the land as a settler as long as the Kirks claim to have been there. It is certain that he had been there for at least five years before he made his homestead entry, as five years' residence was required under the homestead law in effect at that time, and the local land office under the special statute governing entries in this Forest Reserve received and accepted his final proof within three months from the date of his entry. The patent of course took effect from the time of his settlement. Shepley vs. Cowan, 91 U. S. 330-337.

There is serious doubt whether the Court has jurisdiction

in this case for the reasons already stated. But if there be jurisdiction, it is clear that under the numerous decisions herein cited the United States patent upon which defendant in error relies is impervious to collateral attack, and the decisions of the various tribunals within the land department, resulting in the issuance of the patent, are conclusive in this action. And, even if there were authority for reviewing the proceedings in the land department, there is no legal cause or just reason for disturbing the concurring conclusions of its various tribunals which cancelled a mineral entry on land valuable only for farming and gave said land to the homestead entryman.

We respectfully ask that the judgment of the Supreme Court of the State of South Dakota be affirmed.

Respectfully submitted,

SAMUEL HERRICK,

CLIFFORD A. WILSON,

Attorneys for Defendant in Error.

THE case is stated in the opinion.

Mr. William G. Porter, Mr. Ed. L. Grantham and *Mr. C. C. Croal* for plaintiffs in error, submitted.

Mr. Samuel Herrick, with whom *Mr. Clifford A. Wilson* was on the brief, for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was a suit to quiet the title to a small tract of land in South Dakota which had been the subject of conflicting claims under the public land laws. One claim was made under the placer mining law and the other under the homestead law. Both claims embraced other lands, the tract in question being all that was common to both. It was subject to disposal under the placer mining law if valuable for placer mining, and under the homestead law [1] if valuable only for agriculture. Whether it was valuable for the one purpose or the other was a question of fact to be determined by the officers of the Land Department. The claim under the placer mining law was first brought to the attention of those officers and, upon *ex parte* proofs presented in support of that claim, they found the tract to be valuable for placer mining and permitted it to be included in a placer entry. The homestead claim was next brought to their attention and, upon *ex parte* proofs presented in support of that claim, they found the tract to be valuable only for agriculture and permitted it to be included in a homestead entry. Thus the findings upon the *ex parte* proofs were incon-

[1] The tract was in the Black Hills Forest Reserve and, if agricultural land, was brought within the operation of the homestead law by the Acts of March 3, 1899, c. 424, 30 Stat. 1095, and April 15, 1902, c. 507, 32 Stat. 106.

sistent and the tract was included in conflicting entries. This was discovered before either entry was passed to patent, and so a hearing was ordered to determine the true character of the land. The placer entry had been made by two brothers and through some inadvertence one of these was not notified of the hearing. The other brother and the homestead entryman appeared and the hearing proceeded as if all parties in interest were present; that is to say, there was no reference to the absence of the placer claimant not notified. Upon the proofs produced at this hearing the land officers found the tract to have no value for placer mining and to be valuable only for agriculture, and as a result of the finding the tract was eliminated from the placer entry and the homestead entry was passed to patent. The patentee afterward sold and transferred the tract to the plaintiff, who knew that a right to it was still being asserted under the placer entry.

By their answer, which was in the nature of a cross bill, the defendants, who were the placer claimants, asserted that they had located and were entitled to the mining claim before mentioned, that the tract in question was lawfully included in that claim and was valuable for placer mining, that the entry of the claim at the land office was lawful and entitled them to a patent, and that the subsequent elimination of the tract from that entry was unlawful and violative of their rights, because the earlier finding that the tract was valuable for placer mining was conclusive upon that point, and, if not conclusive, could not be recalled or disturbed except upon due notice to both placer claimants and after giving them a reasonable opportunity to sustain their entry by evidence and otherwise. The right of the homestead claimant to have the tract patented to him was questioned on other grounds, but these need not be noticed, for they plainly were such as could not be urged by the defendants. The answer con-

cluded with a prayer that the plaintiff be decreed to hold the title to the tract in trust for the defendants and compelled to convey the same to them.

At the trial the evidence bearing upon the character of the tract disclosed, without any contradiction, that it had no value for placer mining, but was strictly agricultural land, and that its only use by the placer claimants had been for farming purposes.

The plaintiff was given a decree, which was affirmed, 35 S. Dak. 620, and the defendants seek a review here.

A statement of the case leaves little to be said, for the pertinent rules of decision are well settled and easily applied.

The original finding respecting the character of the tract was not in itself final or conclusive, but essentially interlocutory. It was only a step in the proceedings looking to the ultimate disposal of the title, and, until the issue of a patent, was as much open to reconsideration and reversal as are the interlocutory orders or decrees of a court of equity until the entry of a final decree. *New Orleans* v. *Paine*, 147 U. S. 261, 266; *Michigan Land and Lumber Co.* v. *Rust*, 168 U. S. 589, 592 *et seq.*; *Hawley* v. *Diller*, 178 U. S. 476, 488. In the last case this court said: "The Land Department has authority, at any time before a patent is issued, to inquire whether the original entry was in conformity with the act of Congress."

Without any doubt both placer claimants were entitled to notice of the intended reconsideration of the character of the tract and to an opportunity to sustain the original finding by evidence and otherwise. *Parsons* v. *Venzke*, 164 U. S. 89, 91, and cases *supra*. One was not notified and so was not accorded the opportunity to which he was entitled. This irregularity prevented the ultimate finding, upon which the homestead patent rested, from being conclusive of the character of the tract, as against him. *Thayer* v. *Spratt*, 189 U. S. 346, 351. He,

therefore, was entitled in this suit to assert and show, if such was the fact, that the tract was valuable for placer mining, as originally found by the land officers; and had he shown that this was its real character, he would have been entitled to a decree charging the title with an appropriate trust for his benefit. *Guaranty Savings Bank* v. *Bladow*, 176 U. S. 448, 453, 454; *Thayer* v. *Spratt*, *supra*. But no such showing was made at the trial. On the contrary, the evidence established that the tract was strictly agricultural, and therefore not subject to entry or acquisition under the placer mining law. Thus it appears that the irregularity complained of was not prejudicial and did not result in the issue of a patent to one when it should have gone to another. See *Bohall* v. *Dilla*, 114 U. S. 47; *Sparks* v. *Pierce*, 115 U. S. 408; *Johnson* v. *Riddle*, 240 U. S. 467, 481.

Judgment affirmed.

KIRK ET AL. *v.* OLSON.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

No. 81. Argued November 23, 1917.—Decided December 10, 1917.

A finding of mineral character made in allowing an entry under the placer mining law is subject to be reconsidered and reversed by the Land Department at any time before the patent issues, upon due notice to the parties interested.

Where land embraced in conflicting placer and homestead entries is found, upon hearing in the Land Department, to be non-mineral and therefore is patented to the homesteader, the finding does not conclude a claimant under the placer entry who was not notified and given opportunity to be heard; a trust might be declared in his favor if he proved the land mineral; but not when the evidence confirms the Department's finding.

35 S. Dak. 620, affirmed.